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Nos. 43, 206, 264

In the Supreme Court of the United States

OCTOBER TERM, 1951

PETER HARISIADES, PETITIONER

v.

EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION AT THE PORT OF NEW YORK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LUIGI MASCITTI, APPELLANT

v.

J. HOWARD MCGRATH, ATTORNEY GENERAL OF THE UNITED STATES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DORA COLEMAN, APPELLANT

v.

J. HOWARD MCGRATH, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Appeals in No. 43 (R. 987-994) is reported at 187 F. 2d 137. The opinions of the District Court (R. 875-934, 966-

979) are reported at 90 F. Supp. 397, 431. The specially convened three-judge District Court did not enter opinions in Nos. 206 and 264, heard together in the District Court for the District of Columbia. Copies of the orders of that court in No. 206 appear in the Record of that case, pp. 8-9; and in No. 264 in the Record of that case, pp. 5-6.

JURISDICTION

The judgment of the Court of Appeals in No. 43 was entered on February 6, 1951 (R. 995). The petition for a writ of certiorari filed on May 3, 1951, and was granted on October 8, 1951 (R. 996). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

The orders of the District Court in Nos. 206 and 264 denying appellants' motions for preliminary injunctions and dismissing their complaints were entered June 18, 1951 (No. 206, R. 9; No. 264, R. 5-6).[1] Petitions for appeal in No. 206 was filed in the district court on June 28, 1951, and in No. 264 was filed July 30, 1951 (No. 206, R. 9-10; No. 264, R. 6). Probable jurisdiction was noted in both cases by this Court on October 8, 1951. (No. 206, R. 21; No. 264, R. 26.) The jurisdiction of this Court to review on direct appeal the judgments of the District Court denying the preliminary injunctions prayed for and dismissing appellants' complaints is conferred by 28 U.S.C. 1253.

[1] Earlier orders in both cases were entered on March 20, 1951, denying motions for preliminary injunctions (No. 206, R. 8; No. 264, R. 5). These orders were vacated and set aside in the June 18 order.

QUESTIONS PRESENTED

1. Whether Congress has constitutional power to determine that aliens who were formerly members of an organization advocating violent overthrow of the Government are undesirable residents who should be deported, without requiring a finding that the alien knew the purposes of the organization.

2. Whether the act requiring deportation of such aliens is unconstitutional because of its alleged *ex post facto* or restrospective effect.

3. Whether the Administrative Procedure Act applied to deportation proceedings where the warrant of arrest was served prior to the effective date of the act.

4. Whether deportation proceedings not complying with sections 5 and 11 of the Administrative Procedure Act complied with the requirements of procedural due process.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra* pp. 136-142.

STATEMENT

No. 43. Harisiades, a Greek national, came to this country in 1916 at the age of 13 (R. 104-105). Admittedly he joined the Communist Party in 1925 [2] and continued as an active member until the

[2] It was then called the Workers Party. The name was changed to Communist Party of the United States of America in 1939, while petitioner was a member (R. 27-28).

latter part of 1939, when the Party dropped aliens from membership (R. 28, 46). He was at various times a Branch Executive Committeeman (R. 29), an organizer of the Communist Party in Massachusetts and later in the Ohio valley (R. 29-30), Secretary of the Greek Bureau of the Communist Party, and an editor of its paper, "Empros" (R. 30-31). Since 1939 he has not been officially connected with the Party but he has associated with some of its members (R. 46-47). He testified that he still believes in its philosophy and principles (R. 46-47). He admitted familiarity with Party principles, but claimed that force and violence only were to be used defensively, and that he did not believe in the use of force and violence himself (R. 38-48). He also did not deny that if directed by his Communist Party superiors during the period of his membership to take an active part in the overthrow of the existing United States Government by force, he would have done so (R. 46).

A deportation warrant for Harisiades' arrest under the Act of October 16, 1918, as amended by the Act of June 5, 1920, was issued on April 12, 1930, charging him with being a member of or affiliated with an organization that advocates the overthrow of the government by force and violence (R. 120).[3] The Immigration Service was unable

[3] The allegation was based on admissions which petitioner made to the New Bedford, Massachusetts police (R. 122-123).

to locate appellant [4] and the warrant was not served until May 2, 1946 (R. 16-18, 126).

Deportation hearings were held on October 15, 1946 (R. 13-52), and January 30-31, 1947 (R. 53-119). Immigration inspector Zimmerman, with the consent of appellant (R. 200), acted in the dual capacity of presiding and examining inspector (R. 13). This conformed with the regulations then in force (8 C.F.R. (1949 ed.) 150.6(b), (n)).

At the first hearing, supplemental charges were filed specifying that Harisiades had after entry (a) believed in or advocated the overthrow of the government by force and violence, (b) been a member of an organization that believes in or advocates such overthrow, and (c) been affiliated with such an organization [5] (R. 48).

The inspector, on March 11, 1947, found that these added charges had been sustained, but that the original one (of present membership in a subversive organization) had not. He recommended that Harisiades be deported (R. 126-194).

On August 5, 1947, the Commissioner ordered the case reopened in order to authenticate certain

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[4] Although the *Harisiades* case comes before this Court on petition for certiorari, we shall for convenience refer to Harisiades as an appellant inasmuch as this brief deals both with his petition and with the appeals in the other cases.

[5] *Kessler v. Strecker*, 307 U.S. 22 (1939), had held that the then statute authorized deportation only where the alien was a member of the organization at the time of service of the warrant. Past membership and conduct were made grounds for deportation by the amendment of June 28, 1940, 54 Stat. 673, 8 U.S.C. 137.

documents, receive additional evidence, and file additional charges (R. 197). At the reopened hearings, held in February and March 1948 (R. 204), Harisiades was further charged with having been, after entry, a member of and affiliated with an organization that advocates the overthrow of the government by force and violence and distributes printed matter so advocating (R. 210-211). Although another inspector was to have been appointed, at appellant's request, inspector Zimmerman continued to act as presiding inspector (R. 198-203). Inspector Roberts acted as examining inspector (R. 204, 344).

At the conclusion of these hearings, inspector Zimmerman, in an exhaustive opinion (R. 528-805), found on the basis of the evidence introduced at the hearings, that the Communist Party, in the years from 1925 to 1939, was an organization which advocated the violent overthrow of the government and distributed printed matter so advocating. Accordingly, he found that all the charges, except the original charge of present membership, had been sustained. On review of the record, the Chief Examiner and Assistant Commissioner upheld these recommendations and ordered deportation (R. 807-855). On appeal, the Board of Immigration Appeals sustained the deportation order on the two grounds that appellant had been a member, after entry, of an organization (a) which advocates the overthrow of the government by force and violence, and (b) which distributes printed matter so advocating (R. 868-873). It

found "that the evidence of record does not establish that the respondent personally believed in or advocated the overthrow of the Government of the United States by force or violence," and that "since the respondent has admitted membership in the Communist Party of the United States, we believe that the grounds of deportation based on affiliation are, at the very best, superfluous" (R. 873).

Harisiades, when taken into custody, sued out a writ of habeas corpus in the United States District Court for the Southern District of New York. The writ was dismissed on February 20, 1950 (R. 935), after an exhaustive consideration of the record and issues (R. 875-935; 90 F. Supp. 397-431).

On that same day, this Court handed down its decision in *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, whereupon appellant moved to amend his petition to allege that the administrative proceedings had not been conducted in accordance with the Administrative Procedure Act. The motion was denied, the court holding that the Administrative Procedure Act was inapplicable to these proceedings because they were initiated prior to its enactment (R. 966-979; 90 F. Supp. 431). The contention was also made, and rejected, that the proceedings were wanting in procedural due process in that Zimmerman served in the dual capacity of presiding and examining inspector.

On a consolidated appeal from the orders dismissing the writ and denying the motion to amend, the Court of Appeals upheld the order of deporta-

tion on the merits, but, pursuant to Section 23 of the Internal Security Act of 1950, enacted after the District Court's orders, reversed the judgment on the writ and remanded the cause with directions to hold it in abeyance pending (1) appellant's being afforded the opportunity to choose the country to which he is to be deported and (2) the Attorney General's making a finding that he will not be subjected to physical persecution in the country to which he is sent (R. 993-994).

No. 264. Mrs. Coleman, a native of the Ukraine and last a citizen of Russia, was admitted to the United States for permanent residence in 1914. She was then 13 years of age and has since resided continuously in the United States. She is married to an American citizen and has three native born children. She admits that she joined the Communist Party of the United States in 1919 and remained a member for approximately one year; that she rejoined the Party in 1928 and was a member until about 1930; and that she again joined in 1936 and remained a member until about 1937 or 1938 (R. 21, 10-11, Tr. 31-35).[6]

A warrant was issued on April 22, 1946, charging Coleman "to have been, after entry, * * * An alien who was a member of an organization, association, society or group that advises, advocates, or teaches the overthrow, by force or violence of

[6] The designation "Tr." refers to the transcript of the record of the deportation hearings on file as an exhibit in this case.

the Government of the United States'' (Tr. Exhibit #2). The warrant was served on May 10, 1946 (R. 22).

A hearing was held on June 25, 1946 (Tr. 1), and resumed on July 26, 1949 (Tr. 25). The 1946 hearing was conducted by Presiding Inspector Layton, who seems also to have served as examining inspector. The remaining hearings in 1949 were conducted by Presiding Inspector Zaepfel with one Taffet serving as Examining Inspector.

At the 1949 hearing additional charges were lodged against appellant charging that she had been found to be after entry (1) a member of an organization that advocates the overthrow of the government by force and violence; (2) a member of an organization that distributes printed matter so advocating (R. 9). No objection was made to the addition of these charges. It was proper under the regulations of the Service. 8 C.F.R. (1949 ed.) 150.6(e).

At the hearing, appellant testified that she joined the Party each time because someone called her attention to the injustice against which it was fighting (Tr. 13, 36, 42). She said that she was a member with no set activities (Tr. 38); that she did not sell or distribute literature (Tr. 38) except that she occasionally sold the Sunday Worker (Tr. 45); that she never went to a worker's school or solicited others for membership (Tr. 46); that she had no book, but paid dues when someone from the

Party came to collect and that she did get a receipt of some kind (Tr. 39-40). She testified that she attended very few meetings during her membership and that she attended rallies after she had ceased to be a member (Tr. 37, 44). She said she never heard anyone advocating the overthrow of the government by force or violence and does not believe in it (Tr. 82). Indeed, she professed ignorance of the doctrines and programs the Party sought to advance. (Tr. 14, 15, 19, 48-53). She left the Party because of her health, and because she was not wanted due to her alienage (Tr. 43).

On the basis of the evidence, the presiding inspector found that Coleman had been a member of the Communist Party from 1919 through 1920, 1928 through 1930, and during the years 1936 through 1938 (R. 12). The Acting Assistant Commissioner of Immigration and Naturalization in an opinion dated May 2, 1950, concluded that the charge that appellant had been, after entry, a member of a proscribed organization was sustained (R. 13-20). She found that in the years appellant was a member, the Communist Party was an organization advocating the overthrow of the government (R. 13-16). Inasmuch as the Presiding Inspector had not found that the Party distributed subversive printed matter, the Commissioner did not find the second additional charge sustained (R. 16). She also noted that the warrant charge and the

first charge lodged at the hearing were redundant and for that reason omitted a finding on the warrant charge (R. 16). The Commissioner's opinion was affirmed by the Board of Immigration Appeals on October 11, 1950 (R. 20-24).

Both the Commissioner and the Board of Immigration Appeals rejected a procedural objection to the hearing based on the fact that the presiding inspector was not qualified in accordance with Section 11 of the Administrative Procedure Act, holding that the Act was not applicable to these proceedings which had been initiated prior to its effective date (R. 17-19, 22-24).

Thereafter, appellant filed in the United States District Court for the District of Columbia a complaint seeking to enjoin enforcement of the deportation order because of the unconstitutionality of the statute on which it was based and to have it set aside on review of final agency action under Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. 1009 (R. 1-4). The complaint alleged that the statute on its face and as applied to appellant deprived her of constitutional rights under the First and Fifth Amendments and operated *ex post facto* and that the hearings were improper and not in accord with due process.

On Coleman's motion for a preliminary injunction, a three-judge court sustained the constitutionality of the statute and denied the motion (R.

5). The court remanded the remaining questions for determination by a single district judge and dissolved itself (R. 5). Later, on June 18, 1951, the three-judge court reconvened itself, vacated the March 20 order, entered another order denying the motion for a preliminary injunction, and dismissed the complaint, entering final judgment for the defendant (R. 5-6). It is from this order that the present appeal is taken. No opinion was filed by the three-judge court.

No. 206. Mascitti, a native and citizen of Italy, was admitted to the United States for permanent residence on September 11, 1920 (R. 15). By stipulation between the examining inspector and the alien's attorney, it was admitted that Mascitti was a member, successively, of the Young Worker's Party, the Workers Party, and the Workers (Communist) Party between 1923 and 1929. It was also admitted that those organizations possessed, circulated, and distributed writings which included the most commonly distributed works of Marx, Engels, Lenin and Stalin; and that during the period of Mascitti's membership these organizations advised, advocated, and taught the doctrines and principles contained in these works. (R. 16.)[7]

A warrant for Mascitti's arrest was issued March 20, 1946 and served on him April 8, 1946. It charged him with having been after entry, "a member of an organization, society, or group that

[7] The stipulation is on file in this Court but was not printed.

advises, advocates, or teaches the overthrow by force or violence of the government of the United States."[8]

A hearing was held on April 18, 1946, and resumed on November 7, 1949. At the latter time, additional charges identical to those lodged against Coleman and set out at page 9, *supra*, were lodged (Tr. 63-64).[9]

Mascitti testified that he has had no connection with the Communist Party since 1929 (Tr. 50). He had left once before after a policy dispute in the Party, but rejoined after he had been "begged" to (Tr. 44-45). He testified that he knew that the Party advocated the establishment of proletarian dictatorship by force or violence in the event that the capitalist class resisted but that he did not believe this would happen in the foreseeable future (Tr. 17, 46, 48, 49). He said he never attended Party schools, although he did attend a few rallies (Tr. 39), and that he served as a Party officer only once, and then only as a substitute secretary (Tr. 36). Mascitti also stated that he heard some speakers advocating the use of violence, that he did not personally believe in the forcible overthrow of the United States Government, that he was not entirely clear as to what the policy of the Party was in that respect, and that he resigned when he discovered, or thought through the aims

[8] The warrant is on file but was not printed.

[9] The designation "Tr." refers to the transcript of the deportation hearing on file in this Court.

and precepts of the Party (Tr. 46-50, 78, 82-3). He became a member of the International Workers Order in 1938 and continued in that organization until 1945 (Tr. 52). He was financial secretary of the local unit of his lodge for about a year and a half immediately prior to the termination of his membership in 1945. He testified that he joined the I.W.O. because it offered inexpensive insurance benefits, beginning with very small payments; that the payments increased until he found them onerous. (Tr. 53-54.) He also testified that as secretary he attended meetings more regularly than he had previously done, and he discovered that some members were writing about Russia in the same way the Communist Party had, and he found that some members were distributing an Italian language newspaper which seemed to him to be of Communist tenor. (Tr. 54-55, 58-59).

On the basis of the evidence and, pursuant to the stipulation of the parties, the Presiding Inspector recommended the finding that Mascitti was a member of the Workers Party, in its various forms, between 1923 and 1929, and that these organizations, essentially the Communist Party, advocated the overthrow of the Government of the United States by force and violence during the period of the respondent's membership and distributed printed matter which so advocated during that period.[10] This recommendation was adopted

[10] The findings are on file but not printed.

by the Commissioner[11] (p. 5a of his report, not printed) and by the Board of Immigration Appeals (R. 14-21). The Board said, in answer to the argument that Mascitti did not know the unlawful objectives of the party (R. 17):

> In the first place, the statute by its language does not apply only to "knowing membership". It is, therefore, unnecessary to prove knowledge. *Greco* v. *Haff*, 63 F. (2d) 863; *In re Saderquist*, 11 F. Supp. 526, affirmed *Sorquist* v. *Ward*, 83 F. (2d) 890. Secondly, it has been held that membership is sufficient evidence of knowledge of the proscribed doctrines. *Skeffington* v. *Katzeff*, 277 Fed. 129, 132; *Ex parte Vilarino*, 50 F. (2d) 582, 586. Lastly, the evidence in this case shows that the respondent attended meetings of the Communist Party, read its literature, listened to speeches, and paid his dues.

In the hearings, Mascitti also requested the exercise of the discretion granted to the Attorney General by the 7th proviso to Section 3 of the Immigration Act of 1917, as amended (8 U.S.C. 136(p), in order that he might depart voluntarily from the United States and reenter, despite the grounds for deportation. This relief, granted administratively in the past, was held by the Board

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[11] The Commissioner sustained the additional charges lodged during the hearing, but not the original warrant charge, although regarding that and the first additional charge as substantially identical.

of Immigration Appeals to be beyond its power[12] since the Internal Security Act of September 23, 1950 (Section 22 (6(a)), 8 U.S.C., Supp. IV, 137-5), in explicit terms forecloses such relief to those whose membership in proscribed organizations is the basis for deportation." (R. 17-21).

After the entry of the order of deportation, and its affirmance by the Board of Immigration Appeals, but before any attempt to execute the warrant, Mascitti instituted the present action for declaratory judgment and for review under the Administrative Procedure Act. The complaint (R. 1-4) alleged that the Act, as construed and applied to require Mascitti's deportation by reason of past membership in Communist organizations without regard to his personal beliefs, is unconstitutional, *ex post facto*, a bill of attainder, and violative of the First and Fifth Amendments and Article I, Section 9(3) of the Constitution. It also urged that the refusal to exercise discretion to cancel the deportation proceedings was arbitrary, capricious, and contrary to law.

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[12] The Board's opinion states (R. 15-16):

> Respondent lives with his wife, a legally resident alien, and his United States citizen son. The record established that respondent has been regularly employed, supports his family, and that they are dependent upon him. He is well thought of in his community and by his employers, and is a good workman. Aside from the factors that give rise to this proceeding, respondent's record is excellent. He has no criminal record. An independent investigation conducted by the Immigration and Naturalization Service indicates that all persons interviewed had confidence in respondent's good character and loyalty to the United States and believed that he would be a good citizen.

Mascitti's motion for a preliminary injunction was considered by a three-judge court together with Coleman's, denied the same day, and remanded to a single district judge (R. 8). Thereafter as in the *Coleman* case, the court reconvened itself, vacated its earlier order, denied the motion and dismissed the complaint (R. 9).

SUMMARY OF ARGUMENT

I

Neither the Internal Security Act of 1950 nor Public Law No. 14, enacted March 28, 1951, changes the law applicable to the issues raised by these appeals. The former reenacts the provisions upon which the deportation orders were based. The latter, which Congress regarded as a clarifying amendment which would not change the law, establishes that membership in an unlawful organization must be "voluntary," not resulting from duress or compulsion. Since the present records disclose that appellants joined and remained members of the Communist Party entirely of their own volition, without any suggestion of compulsion, the amendment cannot affect these cases. The requirement that membership be voluntary did not mean that proof was to be introduced in each case as to whether the member knew of or believed in the unlawful objectives of the organization, as the history of the legislation on the subject plainly shows.

II

A. Deportation is the exercise of sovereign power to protect the welfare of the nation by terminating the residence of aliens who are, in the legislative judgment, undesirable or a danger to the nation. In permitting an alien to enter the country, the Government merely accords him a revocable privilege or license to reside here. While here he is entitled to the protection of the Constitution in both substantive and procedural aspects. But one right which an alien does not possess, because of the very fact of alienage, is the right to remain in the United States except to the extent permitted by Congress. "Congress has power to order at any time the deportation of aliens whose presence in the country it deems hurtful * * *." *Ng Fung Ho* v. *White*, 259 U.S. 276, 280. The purpose of the expulsion is not to punish acts or conduct; "it is simply a refusal by the Government to harbor persons whom it does not want" (*Bugajewitz* v. *Adams*, 228 U.S. 585, 591). "It is well settled that deportation, while it may be burdensome and severe for the alien, is not a punishment." *Mahler* v. *Eby*, 264 U.S. 32, 39; *Fong Yue Ting* v. *United States*, 149 U.S. 698, 709, 730. The personal hardship which may result to the individual is the incidental result, and not the purpose, of the legislative judgment that particular classes of aliens are undesirable residents of this country. A fundamental sovereign power,

necessary for the welfare, safety and independence of the nation, is not to be denied because its exercise may result in personal hardship.

B. It has long been settled that a decision of Congress to expel a class of aliens is a political decision which the judiciary cannot review, and that the power to deport is plenary. *Fong Yue Ting* v. *United States*, 149 U.S. 698. This principle has frequently been reasserted or reaffirmed. Cases holding that aliens have procedural rights in deportation proceedings have not suggested that the due process clause restricts the power of Congress to decide as a substantive matter that a certain class of aliens is undesirable.

C. Indeed, with respect to matters essentially relating to foreign affairs, of which deportation is one, exceptionally broad powers have traditionally been recognized. *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304, 315-318. A sovereign state has extensive latitude in determining that a foreigner is an undesirable resident. This authority is not subject to the limitations imposed on Congress when it exercises a domestic power, but is "only limited by treaty obligations * * * entered into with other governments." *Mahler* v. *Eby*, 264 U.S. at 39.

D. Whether or not the power of Congress to determine what classes of aliens should be deported is absolute need not be determined in these cases. For here Congress had a reasonable basis for

denying the privilege of residence in the United States to past members of subversive organizations. The question is not whether the Judiciary, or the Executive for that matter, would have made the same choice. Sponsors of the 1940 amendment wished to make sure that the law required deportation of former members of a subversive organization so as to make it impossible for alien members to avoid deportation merely by resigning from the party. Cf. *Kessler* v. *Strecker*, 307 U.S. 22.

The reexamination of the problem by Congress when it enacted the Internal Security Act of 1950 provided fresh and strong evidence of the danger to the nation from alien communists. The evidence before Congress related not only to the present aggravated menace of communism but also to the fact that the party in this country was dependent upon aliens for its effectiveness. Since the security of the United States was at stake, effective remedial steps were necessary. Certainly, it was reasonable for Congress to conclude that merely to remove aliens presently members of the party was insufficient. As the *Harisiades* case shows, withdrawal from membership does not necessarily mean a change of heart. The difficulties in the way of determining whether a former member of a subversive organization has completely abandoned his subversive activities are obvious. Although Congress realized that the act might reach some

aliens who had reformed, it believed that an alien who has once shown himself to be so unattached to this country and so open to outside influence as to be willing to join a subversive organization is both undesirable in character and a potentially dangerous type of person to whom this country should not wisely extend its hospitality.

To make deportability turn on a former member's personal belief in violent overthrow of the Government or personal knowledge that the party advocated such a policy would present even more difficult problems. In view of the profession of innocence of even the party's top leaders, Congress could reasonably conclude that protection of the nation against aliens who were seeking to overthrow its institutions by force would be thwarted if proof of personal belief in or knowledge of the policy of violence was needed. Thus Congress was entitled to believe and to act on the assumption that most, if not all, voluntary members of a thoroughly regimented and disciplined organization such as the Communist Party, which in itself advocates violent overthrow of the Government, will be aware of and in agreement with the organization's policy, whatever they may assert on the witness stand. Indeed, the danger from a disciplined subversive organization is directly related to its numbers even though many are no longer members or were not consciously aware of the full implication of the program. A man can obey orders which

he does not understand and in that manner commit espionage and sabotage.

Congress was called upon to weigh the possible harm to the safety of the United States if former alien members of a subversive organization could not be deported—for that would in practical effect be the consequence of requiring proof of personal knowledge or belief—as against the hardship which deportation will inflict upon some members of the proscribed class who never did have subversive beliefs and do not have them now. In making that determination Congress could properly take into account both that an alien has no vested right to remain in the United States and that its primary responsibility is to protect the safety of the United States as a whole. Congress is not exercising an unreasonable judgment when it places the national welfare over that of the affected aliens. In many other fields of the law, innocent persons have been held lawfully subjected to controls necessary for the well-being of the community as a whole.

E. The First and Fifth Amendments do not limit the authority of Congress to expel a class of aliens whom it deems undesirable residents. As has been shown, there is reasonable basis for the legislative conclusion that aliens who have voluntarily joined an organization dedicated to the overthrow of the Government are undesirable residents who should be expelled. An alien has no

constitutional right to remain in the United States which would be impaired by such legislative declaration. Furthermore, the statute here under consideration does not regulate First Amendment rights but merely withdraws a revocable privilege of residence because of prior conduct. The interest of this country in terminating the residence of aliens who by their conduct have shown that they are potentially dangerous to the welfare and safety of the country overbalances the limited infringement of any possible personal rights of an alien.

F. 1. To require deportation because of membership in an organization prior to the 1940 Act, is not retroactive legislation, since Congress is merely determining present undesirability from past conduct. *Lewis* v. *Fidelity Co.*, 292 U.S. 559, 571. Furthermore, membership in an organization advocating the violent overthrow of the Government was a ground for deportation in all the years from 1920 to 1939, during which the conduct for which appellants are being deported occurred.

2. Even assuming application of *ex post facto* principles, it is settled that an *ex post facto* law is one which imposes or increases punishment for past conduct, and that the *ex post facto* provisions of the Constitution have no application to civil legislation, unless it was intended as punishment. This Court has declared on a number of occasions that deportation is not a punishment and that the *ex post facto* clause does not apply to deportation

proceedings. See especially *Bugajewitz* v. *Adams*, 228 U.S. 585, and *Mahler* v. *Eby*, 264 U.S. 32. These declarations have never been repudiated or abandoned. The cases upon which petitioners rely—primarily *Cummings* v. *Missouri*, 4 Wall. 277, and *Ex parte Garland*, 4 Wall. 333,—were all cases involving punishment in civil form. Later decisions of this Court clearly establish that civil regulations based on past conduct, even though harmful to the individual, are not invalid as *ex post facto* laws where they represent a bona fide exercise of regulatory power to accomplish a civil purpose, and are not designed to inflict punishment. See especially *Hawker* v. *New York*, 170 U.S. 189. Here the statute is civil legislation which is a legitimate and reasonable exercise of the broad legislative power to classify aliens for purposes of deportation; it is not punishment despite the burden it imposes on affected individuals.

III

The Administrative Procedure Act has no application to these deportation proceedings since they were initiated prior to its effective date. Section 12. The proceedings were commenced no later than the service of the warrant, which is the equivalent of a complaint, before the Procedure Act was enacted. The facts that amended charges were filed after the effective date of the Act, that the findings of deportability were based upon the amended charges rather than those in the warrants,

and that in the *Harisiades* case (though not in the others) the original charge related to present membership and the amended charge to past membership did not transform the cases into new proceedings. The original and amended charges in each instance related to the same facts.

The contention that the provisions of the Administrative Procedure Act here involved are not covered by Section 12 because it exempts "procedural requirement" * * * initiated prior to the effective date of" the Act is unfounded. For it is clear that for this purpose Congress regarded the whole Act as procedural, as its name implies. The context and history of the provision demonstrate that the exemption in Section 12 was intended to apply to all changes effected by the Act, and that none of its provisions were thought to be applicable to proceedings initiated before the effective date.

IV

The deportation hearings complied with procedural due process. The procedure followed was in accordance with that followed in all cases prior to the Administrative Procedure Act as well as with the practice approved by Congress after the decision by this Court in *Wong Yang Sung v. McGrath*, 339 U.S. 33. Appellants' principal substantive complaint as to the unfairness of the hearings relates to the practice by which the same inspector may act both as examiner for the Government and

as presiding officer at the hearing. Harisiades, however, specifically consented to the same person originally acting in both capacities, and subsequently, when the functions were divided, requested that that inspector act in a presiding capacity. Coleman and Mascitti had separate examining and presiding inspectors except for a brief initial hearing, and the findings were not made by any inspector who acted in an examining capacity with respect to them.

ARGUMENT

I

New Statutory Provisions Enacted During the Pendency of These Proceedings Do Not Affect the Deportability of Appellants

During the pendency of the administrative and judicial proceedings in these cases,[12] Congress enacted two new statutory provisions relating to the exclusion and deportation of aliens, the Internal Security Act of 1950, Public Law 831, 81st Cong., 2d Sess., and Public Law 14, 82d Cong., 1st Sess.

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[13] In the *Coleman* and *Mascitti* cases, relief is sought under the Declaratory Judgment and Administrative Procedure Acts. In *McGrath* v. *Kristensen*, 340 U. S. 162, the Government challenged the propriety of such remedies and contended that an order of deportation could be reviewed only through a writ of habeas corpus. As we understand it, the decision in the *Kristensen* case did not finally dispose of this issue, but merely deemed the declaratory judgment remedy a proper vehicle for an adjudication of status. The habeas corpus procedure was properly invoked in the *Harisiades* case, thereby bringing before the Court the issues raised by the appeals in the other cases, irrespective of the jurisdiction of the district court in those cases.

While these statutes are not relied upon by appellants, we believe this Court will wish to consider their possible impact on the issue of appellants' deportability. For the appellate court is bound to base its decision on the law "as it exists when [it] decide[s] the appeal," as the Second Circuit declared in the *Harisiades* case (No. 43, R. 994).[14] Although we are calling the new legislation to the Court's attention, we believe that neither of the new statutes changes the law as it applies to these cases.

1. *The Internal Security Act of 1950.* The Internal Security Act of 1950, popularly referred to as the McCarran Act, became law September 23, 1950, before the Board of Immigration Appeals acted in the *Coleman* and *Mascitti* cases, and was considered by that Board in its decisions. (No. 264, R. 24; No. 206, R. 17, n. 1). The *Harisiades* case was pending before the Court of Appeals when the Act took effect, and it was likewise considered by that Court. (No. 43, R. 992, 994.)

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[14] See, *e.g.*, *Ziffrin* v. *United States*, 318 U. S. 73 (statutory imposition of new condition on granting of Interstate Commerce Commission permit between time of application and administrative decision held binding on Commission); *Carpenter* v. *Wabash Railway Co.*, 309 U. S. 23 (priority in bankruptcy proceeding given in statute enacted pending appeal, required to be recognized in decision on appeal); *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U. S. 184 (holding that terms of labor injunction had to be modified to accord with the provisions of the Clayton Act, passed after entry of district court order); *Bowles* v. *Texas Liquor Control Board*, 146 F. 2d 155 (C.A. 5) (holding that decision on appeal governed by intervening change of administrative board ruling).

The possible applicability of the McCarran Act presents two facets. The first relates to the specific designation of the Communist Party as a proscribed organization, now incorporated in Section 1(2)(C) of the Anarchist Deportation Act of October 16, 1918, as amended by Section 22 of the Internal Security Act, 8 U. S. C., Supp. IV, 137. In Section 2 of the Internal Security Act, Congress made very comprehensive findings regarding the subversive aims of the Communist Party. The purpose for the specific designation of that Party in the deportation statute was to obviate the need for protracted proof in each case as to its objectives.[15] However, paragraphs (F), (G), and (H) in Section 1(2) of the amended Anarchist Deportation Act retain, in addition, the general proscriptions against members and affiliates of organizations advocating the overthrow of the government by force and violence, in terms essentially the same as the provisions of the 1940 Act under which these cases were brought.[16] There is therefore no reason for further hearings or findings in these cases under the McCarran Act.

In addition, Section 23 of the Internal Security Act of 1950 amended Section 20(a) of the Immigration Act of 1917, 8 U. S. C., Supp. IV, 156(a), so as to afford to an alien under order of expulsion

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[15] See Sen. Rep. No. 2230, 81st Cong., 2d Sess., quoted at pp. 88-89, *infra*.

[16] None of the appellants challenge the findings that the Communist Party is an organization advocating the overthrow of the Government by force and violence.

an opportunity to select in the first instance the place to which he desires to be deported. In the *Harisiades* case the Court of Appeals concluded that the alien should be given opportunity to invoke this new procedure (R. 994). In addition, the amended statute precludes deportation to any country in which the deportee would be subjected to physical persecution. We agree that these procedural benefits must be extended to appellants. We submit, however, that these new mandates have been fully satisfied and are not a critical factor in the deliberations of this Court.[17]

2. *Public Law 14.* Public Law 14 which became effective March 28, 1951, provides:

> That the Attorney General is hereby authorized and directed to provide by regulations that the terms "members of" and "affiliated with" where used in the Act of October 16, 1918, as amended, shall include only membership or affiliation which is or was voluntary, and shall not include membership or affiliation which is or was solely (a) when under sixteen years of age, (b) by operation of law, or (c) for purposes of obtaining employment,

[17] Information supplied by the Immigration and Naturalization Service indicates that each of the aliens has been offered an opportunity to select the country to which he desired deportation, in the event the administrative order is executed. Only Mascitti took advantage of that offer, and he has designated Italy as the country of his choice. In addition, Harisiades contended that he would be subject to physical persecution if he were deported to Greece. The Attorney General, acting through the Commissioner of Immigration and Naturalization, has considered this claim and concluded that it was unsubstantiated.

food rations, or other essentials of living, and where necessary for such purposes.

This statute was enacted because Congress thought the Attorney General had misinterpreted the McCarran Act to require the exclusion of everyone who had belonged to a totalitarian organization under any circumstance. Although applicable both to immigration and deportation, it was designed primarily to permit entry of persons forced into such organizations in their native countries under totalitarian regimes. The House Report (H. Rep. No. 118, 82d Cong., 1st sess., p. 2) states:

> The bill makes clear the intent of Congress that aliens who are, or were, voluntary members of the Nazi, Fascist, or other totalitarian parties or organizations are to be excluded, but aliens who were involuntary members of Nazi, Fascist, or other non-Communist totalitarian youth, national labor, student, or similar organizations, are not to be considered ipso facto as members of, or affiliated with, the Nazi, Fascist, or other non-Communist totalitarian parties or organizations within the meaning of the act of October 16, 1918, as amended. Furthermore, aliens who served in the German or Italian or other non-Communist armed forces are not to be considered ipso facto as members of, or affiliated with, the Nazi, Fascist, or other non-Communist totalitarian parties or subsidiary organizations.[18]

[18] Although members of Communist organizations were orig-

It is clear that in using the term "voluntary" Congress was thinking in terms of duress and legal compulsion.

No claim is made that any of the appellants joined the Communist Party under compulsion or duress of any sort. On the contrary the records reveal decisively that each of these defendants joined the Communist Party and continued to be a member of that Party through the exercise of his own volition. In the *Harisiades* case, the Court of Appeals pointed out (R. 993),

> This appellant joined the group voluntarily and at a time when membership in such an organization was ground for expelling him from the country. He served as an organizer in various cities and finally became Secretary of the Greek Bureau of the Communist Party. He never voluntarily withdrew but was dropped from membership for reasons of party policy.

While the circumstances in the other cases are somewhat different, they also demonstrate that in joining the Communist Party, Mascitti and Mrs. Coleman likewise exercised their own free will. There is no basis for any contention that appellants were coerced or incapable of making a free choice.

The requirement that membership be voluntary did not, however, entail, in addition to an absence

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inally excluded, an amendment added on the floor of the Senate required that they be treated in the same way. 97 Cong. Rec. (daily ed.) 2441.

of coercion or legal incapacity, a finding that an alien was aware of or sympathetic with the unlawful objectives of the organization. We believe that such a reading would be entirely inconsonant with the language and objectives of Public Law 14, and with the positive course of legislative expressions by which Congress has manifested its desire to provide for the deportation of alien members of subversive organizations. It has never been an element in the legislative pattern that deportation charges based on an alien's membership in such an organization must be supported additionally by proof that the alien had knowledge of the organization's denounced objectives.

In revising the Anarchist Deportation Act of 1918, Congress sought in the Internal Security Act "to strengthen the provisions of such Act which relate to the exclusion and deportation from the United States of subversive aliens." H. Rep. 3112, 81st Cong., 2nd Sess. p. 54. And Public Law 14 was not fashioned by Congress to modify the stern measures against alien Communists it had sanctioned only a few months earlier in the Internal Security Act of 1950. On the contrary, Congress sought merely to clarify its purpose by indicating that those measures were not to be invoked against aliens who had joined totalitarian organizations while under the shadow of legal or economic compulsion. Such compulsions, although not uncommon in totalitarian nations, are not

ordinarily found in the United States, and only in a very exceptional case would an alien who joined the Communist Party in the United States be in a position to establish duress or any similar factor which would undermine his free volition.

During the legislative deliberations which preceded the enactment of Public Law 14 the sponsors of this measure repeatedly insisted that it was not their purpose in that Act or in the Internal Security Act of 1950 to change previous law and that they "did not intend to nullify or to disturb the body of judicial and administrative interpretations" defining membership in subversive organizations. See H. Rep. 118, S. Rep. 111, p. 2, 82nd Cong., 1st Sess., p. 2. 97 Cong. Rec. (daily ed.) 1417-1418, 1421, 2441, 2442, 2445-2446. Their only object was to overturn what they regarded as a novel interpretation by the Attorney General and to restore what they regarded as the settled rule. In the light of this unmistakably articulated legislative aim it becomes pertinent to inquire as to the content of the previous law that Public Law 14 was intended to reaffirm. We believe that the statutes themselves, their legislative history, and their judicial and administrative interpretation, establish that knowledge or endorsement of the objectives of a proscribed organization is not an essential element of a deportation charge under the Anarchist Deportation Act of October 16, 1918, and its amendments. On the contrary, such an assumption has been consistently rejected.

A reading of the statute itself, both before and after its amendment in the Internal Security Act of 1950, reveals the most precise delineation between charges based upon an alien's personal knowledge and beliefs and those predicated solely on his membership in designated organizations. Thus, in the currently amended version of the 1918 Act, paragraphs (A), (B), (D), (F) and (G) of Section 1(2) relate in whole or part to an alien's personal beliefs; and paragraphs (B), (C), (D), (F) and (H) relate in whole or part to membership in objectionable organizations, without any mention of the alien's knowledge or support of the objectives of such organizations. Moreover, Congress had no difficulty in specifying that certain misconduct had to be committed "knowingly", as it did in Paragraph (G), which deals with the circulation of inflammatory literature. And in Paragraph (E) Congress made provision for affording relief to certain categories otherwise encompassed by the statute (not including those involved here) upon a showing that such aliens were unaware of the character of the organization at the time they joined.[19] It should also be observed that in prescribing many of the criminal penalties found in the Internal Security Act Con-

[19] Senator McCarran explained that under this exception "aliens who were innocent dupes when they joined a Communist-front organization as distinguished from a Communist political organization [such as the Communist Party], would likewise not ipso facto be excluded or deported." 96 Cong. Rec. (daily ed.) 14359, 14358.

gress has specified that the misconduct must have been committed "knowingly."[20] The absence of any similar requirement of knowledge, under the directives commanding deportation for membership in an organization which advocates or which distributes literature advocating forceful overthrow of the Government of the United States, viewed in the light of the entire statutory pattern, clearly bespeaks a Congressional purpose that such membership alone, voluntarily undertaken, shall be a basis for expulsion from the United States.

The legislative development of the Anarchist Deportation Act similarly furnishes the strongest support for this conclusion as to the legislative design. The original immigration enactment directed against subversive aliens was the Act of March 3, 1903, 32 Stat. 1213, which dealt primarily with anarchists and prohibited their entry into the United States only on the basis of a personal belief in anarchy. These provisions were continued in the Act of February 20, 1907, 34 Stat. 898, and were recodified and somewhat expanded in the basic Immigration Act of February 5, 1917, 39 Stat. 874. Until then the statutes dealt only with personal beliefs.

These enactments were in effect superseded by

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[20] See Section 8(a), Act of October 16, 1918, as amended by Section 22 of the Internal Security Act of 1950 (8 U.S.C., Supp. IV, 137-7(a)); Section 20(b), Immigration Act of February 5, 1917, as amended by Section 23 of the Internal Security Act of 1950 (8 U.S.C., Supp. IV, 156(b)).

the Anarchist Deportation Act of October 16, 1918, 40 Stat. 1012, enacted in the closing days of World War I in order to cope with the menace of the I.W.W. and other extremist factions. This legislation is the foundation upon which the later enactments in this area rest. In this statute Congress provided for the first time for the deportation of aliens who were members of prohibited organizations. H. Rep. 645, 65th Cong., 2nd Sess.

In the administration of the 1918 Act, the Department of Labor concluded that deportation charges could not be supported merely by proof of membership in the I.W.W., but that the evidence had to establish in addition personal advocacy of the proscribed doctrines on the part of the alien. See H. Rep. 504, 66th Cong., 2nd Sess. Congress thereupon amended the Anarchist Deportation Act on June 5, 1920, 41 Stat. 1008, for the express purpose of insuring that membership in an organization which advocated or distributed literature advocating the forceful overthrow of the Government of the United States would in itself be a basis for deportation. The report of the House Committee on Immigration and Naturalization, which recommended adoption of this legislation, described in detail the alleged misinterpretation of the Department of Labor, pointed out that the Department of Justice had not agreed with that interpretation, and expressed its dissatisfaction with the Department of Labor's rul-

ings. H. Rep. 504, 66th Cong., 2nd Sess. The Committee further stated, *id.*, p. 7:

> In view of the foregoing the committee believes that Congress should amend section 1 of the act of October 16, 1918, and make it so plain and clear as to admit of no possible doubt that the spirit of the law must be held to coincide with the letter thereof.
>
> Eminent lawyers contend that the act of October 16, 1918, is sufficient, and that the joining of an organization such as the Industrial Workers of the World is of itself the overt act sufficient to warrant deportation. But as the decision of the Secretary of Labor is final in matters of deportation,[21] and as the decisions of that department above quoted have resulted in failure to deport aliens actively at work for the destruction of this Government, the necessity for the amendment becomes not only apparent but urgent.

The principal changes achieved by the 1920 amendment were: (1) the designation of personal advocacy of proscribed doctrines and membership in an organization advocating such doctrines as separate causes for deportation; and (2) the addition of detailed directions for the deportation of aliens who distribute, or who are members of organizations which distribute subversive literature. During the debate in the House of Repre-

[21] On June 14, 1940, responsibility for administration of the immigration laws was transferred to the Attorney General. Reorganization Plan V, 5 F.R. 2223, 2132.

sentatives the following colloquy occurred, clearly portraying the legislative purpose (59 Cong. Rec. 999):

Mr. Hardy of Texas. I understand; if you can prove enough against him he can be deported; but what I want to know is, has the Secretary of Labor, under the law, a right to deport a man simply upon proof that he is a member of the I.W.W.?

* * * * * * *

Mr. Raker. If a man is a member of the organization teaching the doctrines that they do teach, that everyone knows and admits that they teach, that he holds a membership card which is found upon him, that he admits that he belongs to the organization and pays dues to the organization, the Government should deport him without a further overt act on his part.

Mr. Hardy of Texas. The gentleman from California thinks that every man who holds a card in the I.W.W. ought to be deported?

Mr. Raker. You can deport none but aliens. My statement is clear, and there is no doubt as to what it is. A man who belongs to an organization which advocates the unlawful destruction of property, who believes in anarchy which teaches the overthrow and destruction of the Government of the United States by force and violence, which teaches the assassination of public officers because they are public officers, should be deported. There can be no question that it is the intent of Congress, the intent of the American people, and the

> desire of ninety-nine persons out of a hundred of the men, women, and children who believe in this country, that this law ought to be enforced and enforced rigidly.

Not even Representative Hardy dissented when the bill subsequently was approved unanimously and without change in the House of Representatives. 59 Cong. Rec. 1003. The Senate Immigration Committee amended the bill by inserting "knowingly" in relation to circulating subversive literature, to make it conform with the prohibition against knowingly possessing such literature which was already in the bill. 59 Cong. Rec. 8539. Significantly, no similar change in relation to membership in a proscribed organization was suggested or adopted at any stage in the proceedings. The bill, as amended by the Senate Committee, was passed without comment or objection in the Senate (*ibid.*), and the House thereafter concurred in the Senate amendments. *Id.*, p. 8665. We believe that the history of the 1920 amendment demonstrates that Congress intended in the Anarchist Deportation Act and in its amendments to deport alien members of the prohibited groups, without regard to whether their membership was maintained with knowledge of the denounced objectives.

The next major revision of the Anarchist Deportation Act occurred in the Alien Registration Act of June 28, 1940, 54 Stat. 670. Here too the legislative proceedings are instructive. In the original

draft of this bill, the House Committee on the Judiciary urged that expulsion should be ordered if the alien, at any time after entry "knowingly and voluntarily at any time became a member" of any of the designated classes. H. Rep. 994, 76th Cong., 1st Sess. p. 6. This phraseology appeared in Section 2 of the proposed bill, which was approved in this form by the House of Representatives. 84 Cong. Rec. 10,456.

The Senate Judiciary Committee in its initial report favored approval of the House bill without amendment, and thus proposed to continue the specification that the membership must have been "knowingly and voluntarily"[22] undertaken. Sen. Rep. 1154, 76th Cong., 1st Sess.; 84 Cong. Rec. 11,124. However, this report was withdrawn and the bill was recommitted to the Committee. 86 Cong. Rec. 473. The Senate Committee thereafter issued a second report, S. Rep. 1721, 76th Cong., 3rd Sess., but the exact form of their revision appears neither in that report nor in any statements on the floor of the Senate. However, the committee report stated (p. 2):

> The amendment of the Senate committee striking out section 2, and inserting the language of existing law, was thought necessary to prevent hardship on aliens who may have, in the distant past, but who had renounced,

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[22] The distinction between knowledge and voluntariness implicit in this proposal should be noted.

before coming to the United States, their membership in such classes.

The report mentioned no requirement that the membership *in the United States* must have been knowing and voluntary. This report likewise was withdrawn (86 Cong. Rec. 7649), and a new and final report was issued by the Senate Committee, which set forth the bill as finally approved by the Senate. In this final revision the declaration that the membership must have been "knowingly and voluntarily" assumed was omitted. Sen. Rep. 1796, 76th Cong., 3rd Sess. There is no explanation as to the reason for that omission either in this report or at any other point in the legislative deliberations.[23] However, this report declared (p. 3):

> Section 23 amends the act of October 16, 1918, which provides for the exclusion and

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[23] While the bill was under consideration in the House, and at a time when it still contained the limitation that membership must have been acquired "knowingly and voluntarily," Representative Hobbs pointed out, 84 Cong. Rec. 10,448-49, that:

> * * * in order to correct any possible hardships that might arise under the provisions of this section, on his motion, the words "knowingly and voluntarily" were inserted, so that the case of the poor Swede who joined the Communist Party without full knowledge of what he was doing, or the case of someone who might be under the influence of liquor or a narcotic and joined ignorantly, would be removed from the field of operation of this section. * * *
>
> *Mr. Gwynne.* But it does not cover the case of a man who joined voluntarily.
>
> *Mr. Hobbs.* I realize that, and that of course is the crux of this situation * * *"

> deportation from the United States of aliens who are members of the anarchistic and similar classes, so as to provide that no alien shall be admitted to the United States who has at any time been a member of such classes, and to also provide that any alien who has been a member of such clases at any time after his admission to the United States (for no matter how short a time or how far in the past so long as it was after the date of entry), shall be deported.

This statement of purpose was repeated in the Conference Report, H. Rep. 2683, 76th Cong., 3rd Sess. p. 9.

The Alien Registration Act of 1940, 54 Stat. 670, as finally passed by Congress, thus eliminated the direction, which had been incorporated in earlier versions of this measure, that deportation could be ordered only if the membership in the revolutionary society had been knowing and voluntary. This omission should be compared with other directives in Section 20 of the same statute, 54 Stat. 672, commanding the deportation of aliens who "knowingly" aided other aliens to enter in violation of law, and in Section 2(a) of that statute, 54 Stat. 671, which prescribed criminal penalties for aliens who "knowingly" advocate the overthrow of the Government of the United States by force and violence. The omission of similar language in the amendment of the Anarchist Deportation Act shows plainly that Congress did not regard knowledge as an essential element in expulsion orders

directed against alien members of subversive groups.

Thus, the statutes themselves and the legislative background establish that proof of knowledge of the unlawful purposes is not prerequisite to the deportation of an alien communist. The same conclusion follows from an examination of the previous judicial and administrative constructions of the term "membership" which the sponsors of Public Law No. 14 insisted vigorously that they sought only to reaffirm.

Analysis of administrative and judicial rulings discloses that knowledge of guilty purpose has not been regarded as necessary to prove a charge under the Anarchist Deportation Act of 1918, as amended, relating to membership in an organization described in that statute. Over the course of many years the courts have invariably sustained deportation charges supported only by proof of membership in the Communist Party, coupled with an elaboration of that organization's violent objectives, without any requirement that the alien must be shown to know of and subscribe to those objectives. *Skeffington* v. *Katzeff*, 277 Fed. 129 (C. A. 1); *Ex parte Vilarino*, 50 F. 2d 582 (C. A. 9); *In re Saderquist*, 11 F. Supp. 525 (D. Me.), affirmed 83 F. 2d 890 (C. A. 1). Moreover, when the issue was raised, the courts have declared unequivocally that the aliens' knowledge of or belief in the unlawful program of the Communist Party was not relevant to the consideration of such ex-

pulsion charges. *Kjar* v. *Doak*, 61 F. 2d 566, 569 (C. A. 7); *Greco* v. *Haff*, 63 F. 2d 863, 864 (C. A. 9). This concept was succinctly expressed in *Ex parte Bridges*, 49 F. Supp. 292 (N.D. Cal.):

> Congress has made alien membership in or affiliation with proscribed organizations grounds for deportation without reference to knowledge on the alien's part of the proscribed character of the organizations with which he has affiliated himself.[24]

The administrative construction both before and after enactment of the Internal Security Act has consistently adhered to this reading of the statute. See administrative decisions in the instant cases, and *Matter of O.*, Interim Decision No. 92, decided by the Board of Immigration Appeals, September 13, 1949.

It thus seems abundantly clear that in the Anarchist Deportation Act of 1918, and in its various amendments, Congress explicitly intended to require expulsion of an alien member of one of the organizations described in those statutes, without any proof as to whether he himself knew or espoused the organization's subversive aims. There is not the slightest evidence that in Public Law 14, Congress intended to alter the standards it had previously enunciated with such marked emphasis. In this explanatory legislation Congress merely

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[24] This was not questioned in the subsequent consideration of that case in the Court of Appeals and in this Court. See *Bridges* v. *Wixon*, 144 F. 2d 927 (C.A. 9); 326 U. S. 135.

asserted that it had not intended to encompass membership induced by duress or comparable factors impairing free volition. Senator McCarran, a leading protagonist of the measure, explained that in the Internal Security Act Congress had sought to facilitate deportation proceedings against alien communists. 97 Cong. Rec. (daily ed.) 2443. He declared that this new legislation would benefit aliens who had been "forced into" the Communist Party (*id.*, p. 2441), and continued:

> I refer to the group of those who may have been forced into the Party by dint of laws or regulations or conditions under which they existed, or because they were immature children at the time when they were forced in.

Senator Nixon commented (*id.*) that:

> in general, a Communist Party organization is close knit and does not contain members who are involuntary members or who were brought into the organization by force or duress.

Agreeing with this comment, Senator McCarran replied (*id.*):

> The subsidiary parties are the ones in which such cases have occurred.

There is no inconsistency between this concept and *Colyer* v. *Skeffington*, 265 Fed. 17, 72 (D. Mass.), which is referred to in a memorandum inserted into the Congressional Record by Senator McCarran. 97 Cong. Rec. (daily ed.) 2445-2446. In

that case the court was concerned with aliens who had joined an ostensibly innocent organization which later had merged with a proscribed group. In the language quoted by Senator McCarran, Judge Anderson stated:

> I accord with what I understand now to be the view of the Department of Labor,[25] that such membership must be a *real* membership in or an *actual* affiliation with the proscribed organization. I do not think that Congress meant to authorize the expulsion of aliens who pass from one organization into another, supposing the change to be a mere change of name * * * Congress could not have intended to authorize the wholesale deportation of aliens who, accidently, artificially, or unconsciously, in appearance only, are found to be members of or affiliated with an organization of whose platform and purposes they have no real knowledge.

These comments were addressed to the situation then before the District Court.[26] Judge Anderson was not holding that persons who had deliberately and consciously joined the party, and who had some

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[25] This apparently was the view which Congress criticized in enacting the amendment of June 5, 1920, which became law while the *Colyer* case was under consideration by the District Court.

[26] The language in question related to nine of the twenty aliens whose cases were considered by Judge Anderson in the *Colyer* case. Although the decision as to 4 aliens was reversed on appeal, *Skeffington* v. *Katzeff*, 277 Fed. 129 (C.A. 1), the Government took no appeal from Judge Anderson's decision in relation to the nine aliens in question. Thus, these views were not challenged in the Court of Appeals.

knowledge of its platform and purposes, were not deportable. The records in the instant cases preclude any argument that volition was absent. It has not been, and cannot well be suggested that these aliens were not "real members" or that they had joined "accidentally, artificially, or unconsciously, in appearance only." On the contrary, it appears incontrovertibly that in each of these cases the aliens joined voluntarily, participated voluntarily, and continued their membership voluntarily during years of activity.

By his own admission Harisiades was a member and an active functionary of the Communist Party from 1925 to 1939. (R. 28).[27] He was entirely familiar with the objectives and program of that Party, and fully agreed with and subscribed to the published aims, doctrines or principles of the Party, but denied that it advocated violence or that he favored it. (R. 34-35, 38-42, 45, 48, 55). He asserted his belief in Marxism-Leninism during the period of his membership, and stated that he still believed in those doctrines (R. 47, 117, 845). He participated in controlling the policies of a Communist newspaper and was Secretary of the Greek Bureau of the Communist Party (R. 30-32). He was also a party organizer and was an active participant in the Party's local and national affairs. (R. 29-30). He did not terminate his membership voluntarily but was dropped because

[27] Between 1925 and 1929 the organization was known as the Workers (Communist) Party.

of a Party policy that aliens should no longer be members (R. 46). It cannot reasonably be urged that Harisiades was not a "real member" of the Communist Party or that he had joined "accidently, artificially, or unconsciously, in appearance only."

While the association of appellants Mascitti and Coleman with the Communist Party did not entail such conspicuous positions of leadership, their membership indubitably was entered into voluntarily. Mascitti concededly was a Party member between 1923 and 1929 (R. 16).[28] His testimony shows clearly that his joinder was voluntary and that he had voluntarily distributed the Party's literature (Tr. 33-36, 36-38). He was familiar with the Party's doctrines, and although generally contending that force and violence was not an essential component, he knew that the Party advocated proletarian dictatorship which was to be established by force and violence if anticipated resistance by the capitalist class made this necessary. (Tr. 47-49). He admitted also that he was present at meetings at which some speakers advocated violent overthrow of the Government whenever necessary and that "to a certain extent" he knew that the party advocated force and violence. (Tr. 50, 78, 82-83).

Mrs. Coleman professed an amazing ignorance

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[28] During his membership the organizations were known as the Young Workers Party, The Workers Party, and the Workers (Communist) Party.

of the party's program and activities.[29] However, she stated that she had joined the party on three occasions because friends had requested her to do so, which, of course, meant that she joined voluntarily. She first joined in 1919 and remained a member for one year (Tr. 11, 47). She rejoined in 1928 and this time stayed for two years (Tr. 33, 39). She again rejoined in 1936 and dropped out in 1937 or 1938, in part because the party no longer wanted alien members (Tr. 35, 42, 43). She had sold the Daily Worker and admitted slight familiarity with some of the Communist literature and leadership. (Tr. 14, 15, 19, 45, 48-53.)

Under these circumstances the membership of the appellants in the Communist Party can hardly be described as coerced or otherwise involuntary. On the contrary, it seems quite clear that they were voluntary members of the Communist Party, and that theirs was the type of membership Congress sought to reach in the Anarchist Deportation Act, as amended. Since the goal of that party to overthrow the Government of the United States by force and violence has been established by evidence adduced in these proceedings and not challenged here, the appellants are amenable to expulsion under the mandate of the Anarchist Deportation Act of 1918, as amended.

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[29] *E.g.*, "Q. How about Joseph Stalin? Do you know who he is?

A. He is Russian, isn't he?" (Tr. 52).

II

Congress Has the Power to Terminate the Residence in This Country of Aliens Who at Any Time After Their Entry Into the United States Belonged to an Organization Which Advocated the Overthrow of the Government by Force and Violence

This is the second time that this Court has considered the constitutionality of the provision in the Act of June 28, 1940 (54 Stat. 670, 673, 8 U. S. C. 137) for the deportation of aliens who were formerly members of an organization which advocates or teaches the overthrow of the United States Government by force or violence. In *Bridges* v. *Wixon*, 326 U. S. 135, the Court, as such, found it unnecessary to pass upon the constitutional issues. Four of the eight sitting justices[30] nevertheless expressed their views. Mr. Justice Murphy, in a concurring opinion, stated that the statute was unconstitutional. Chief Justice Stone, Mr. Justice Roberts, and Mr. Justice Frankfurter, dissenting, after considering non-constitutional arguments, declared (at p. 178) that:

> Petitioner has made a number of other arguments which the Court finds it unnecessary to discuss. We think that they too are without merit. We would affirm the judgment.

Among these arguments were the constitutional questions raised here.

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[30] Mr. Justice Jackson did not participate.

As appears from Point I, Congress has determined that aliens who at any time after entry voluntarily belonged to an organization which advocated the overthrow of the Government by force and violence are undesirable residents and shall be deported. Appellants' attacks on the constitutionality of the statute are predicated on the assumption that a decision of Congress to deport a class of aliens is limited by the same considerations which under the Bill of Rights would preclude criminal prosecution or similar forms of restraint. That assumption is, however, contrary to a long line of decisions of this Court, and ignores the origin, nature and purpose of the power to expel aliens.

A. DEPORTATION IS NOT PUNISHMENT BUT SIMPLY THE EXERCISE OF INHERENT SOVEREIGN POWER TO EXPEL UNDESIRABLE ALIENS FROM THE COUNTRY.

Deportation is not punishment of the individual; it is the exercise of sovereign power to protect the welfare of the nation by terminating the residence of aliens who are, in the legislative judgment, undesirable or a danger to the nation, whether or not that danger arises from the personal fault of the individual. *Mahler* v. *Eby*, 264 U. S. 32, 38-39; *Bugajewitz* v. *Adams*, 228 U. S. 585, 591; *Wong Wing* v. *United States*, 163 U. S. 228, 237; *Fong Yue Ting* v. *United States*, 149 U. S. 698, 709, 730. Cf. *American Communications Association* v. *Douds*, 339 U. S. 382, 413-414. "[S]ince the mere

presence of aliens, apart from particular acts done or threatened to be done by them such as tend to injure or destroy the peace of the state, may constitute a menace to its security, that presence may of itself justify their expulsion." Bouvé, *Exclusion and Expulsion of Aliens*, pp. 5-6. The purpose of the expulsion is not to punish acts or conduct; "it is simply a refusal by the Government to harbor persons whom it does not want" (*Bugajewitz* v. *Adams, supra*, 228 U. S. at 591). "It is well settled that deportation, while it may be burdensome and severe for the alien, is not a punishment. * * * Congress by the Act of 1920 was not increasing the punishment for the crimes of which petitioners had been convicted, by requiring their deportation if found undesirable residents." *Mahler* v. *Eby*, 264 U. S. 32, 39.

As was said by the Court in *Fong Yue Ting* v. *United States, supra*, 149 U. S. at 709:

> * * * "Deportation" is the removal of an alien out of the country, simply because his presence is deemed inconsistent with the public welfare, and without any punishment being imposed or contemplated, either under the laws of the country out of which he is sent, or under those of the country to which he is taken.

And further, at 730:

> * * * The order of deportation is not a punishment for crime. It is not a banishment, in

> the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority and through the proper departments, has determined that his continuing to reside here shall depend. He has not, therefore, been deprived of life, liberty or property, without due process of law; and the provisions of the Constitution, securing the right to trial by jury, and prohibiting unreasonable searches and seizures, and cruel and unusual punishments, have no application.

The case of *Wong Wing* v. *United States, supra*, 163 U. S. 228, presents an illuminating comparison between deportation and actual punishment. A resident alien Chinese was summarily sentenced to 60 days at hard labor and then ordered deported, under the statute involved in *Fong Yue Ting* v. *United States, supra*, 149 U. S. 698 (see discussion, *infra*, pp. 58-61, 94-95), for having been found in the United States without a certificate of residence. The deportation order was upheld, following *Fong Yue Ting*, but the sentence was condemned as punishment without a judicial trial. Indeed, there was more reason for contending that these deportations were punishment than in the instant case, for there the purpose of the statute was not to expel the resident aliens as undesirables but to force them to

secure certificates of residence. See *Fong Yue Ting* case, (Mr. Justice Brewer dissenting), 149 U. S. at 740.

In permitting an alien to enter the country, the Government merely accords him a revocable privilege or license to reside here. While here he is subject to the protection of the Constitution in both substantive and procedural aspects. *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Wong Wing* v. *United States, supra; Japanese Immigrant Case*, 189 U. S. 86. But one right which an alien does not possess, because of the very fact of alienage, is the right to remain in the United States except to the extent permitted by Congress. "Congress has power to order at any time the deportation of aliens whose presence in the country it deems hurtful * * *." *Ng Fung Ho* v. *White*, 259 U. S. 276, 280. Regardless of the length of his residence or the propriety of his conduct while residing here, neither the Fifth Amendment nor any other provision of the Constitution confers on an alien a vested right to remain in the country. See *Mahler* v. *Eby*, 264 U. S. 32; *Ng Fung Ho* v. *White*, 259 U. S. 276, 280; *Bugajewitz* v. *Adams*, 228 U. S. 585, 591; *Tiuco* v. *Forbes*, 228 U. S. 549; *Wong Wing* v. *United States*, 163 U. S. 228, 237; *Lem Moon Sing* v. *United States*, 158 U. S. 538, 547-549; *Fong Yue Ting* v. *United States*, 149 U. S. 698. Cf. *The Chinese Exclusion Case* (*Chae Chan Ping* v. *United States*), 130 U. S. 581. Continued residence here

is, like the privilege of naturalization, not a matter of right. The act of deportation, therefore, does not in itself abridge a personal right guaranteed by the Constitution.

It is true that the termination of the privilege of residing in the United States "may be burdensome and severe for the alien," as the Court recognized in the *Mahler* case (264 U. S. at 39). The Court nevertheless concluded that deportation "is not a punishment." "The fact that harm is inflicted by governmental authority does not make it punishment" (Frankfurter, J., concurring, in *United States* v. *Lovett*, 328 U. S. 303, 324). The personal hardship which may result to the individual is the incidental result, and not the purpose, of the legislative judgment that particular classes of aliens are undesirable residents of this country. A fundamental sovereign power, necessary for the welfare, safety and independence of the nation, is not to be denied because its exercise may result in personal hardship. Many other types of statutes which are not punishment also cause serious harm to particular individuals, citizens as well as aliens. Laws requiring service in the armed forces, laws prohibiting previously lawful businesses, quarantine laws of both persons and property, condemnation of property without payment when dangerous to the public health and welfare irrespective of the innocence of the owner, and forced relocation of certain American citizens in time of

war are familiar examples of situations in which laws enacted for the general welfare of the nation severely hurt some persons, yet are not regarded as imposing punishment.

The power to expel aliens, while like the police power in that it is for the protection of society, is complementary to the police power. It is a preventive, not a penal, process. It is separate and distinct from the police power and universally acclaimed as fundamental to independence and sovereignty. See *Tiaco* v. *Forbes*, 228 U. S. 549, 556; *Fong Yue Ting* v. *United States*, 149 U. S. 698.

The severe impact of deportation upon particular individuals has caused this Court on numerous occasions to refer to it as "a drastic measure"[31] and, in certain contexts as a penalty.[32] None of these cases, however, involve judicial review of the Congressional judgment that a particular class of aliens should be deported, and none of them purport to overrule the established body of authority cited above which states again and again that for constitutional purposes deportation is not a punishment. None of them have held that, as a general matter, deportation must be governed by the constitutional limitations applicable to penal laws, such as trial by jury. There is a manifest differ-

[31] *Fong Haw Tan* v. *Phelan*, 333 U. S. 6, 10; *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 50; *Delgadillo* v. *Carmichael*, 332 U. S. 388, 391; *Ng Fung Ho* v. *White*, 259 U. S. 276, 284.

[32] *Jordan* v. *DeGeorge*, 341 U. S. 223, 231; *Fong Haw Tan* v. *Phelan*, 333 U. S. 6, 10; *Bridges* v. *Wixon*, 326 U. S. 135, 154.

ence for constitutional purposes between the Congressional judgment that a particular class of aliens are not desirable residents of the country and the determination that in a particular case a particular alien falls within that class. The judgment that a class of aliens should be deported is a general political judgment that, from the interest of the general welfare, such aliens are undesirable. But an alien who does not belong to the designated class has not been found by Congress to be undesirable. It is, therefore, proper that in specifying the class to be deported, Congress should be required to make its intention plain. Cf. *Jordan* v. *DeGeorge*, 341 U. S. 223, 243. But this does not mean that, where Congress has clearly indicated its intent, its judgment must be reviewed by the same standards as would be applied if it were enacting domestic criminal legislation.

B. DECISIONS OF CONGRESS TO DEPORT CLASSES OF ALIENS ARE POLITICAL DECISIONS, UNRESTRAINED BY THE BILL OF RIGHTS, AND ARE NOT REVIEWABLE BY THE JUDICIARY.

Before the birth of this country, it was an accepted principle of international law that there is inherent in sovereignty the plenary right and power to exclude aliens or to deport them. This is a fundamental sovereign power, necessary to maintain normal international relations and to defend the nation against foreign encroachment

and dangers. Without it the country would not be a complete sovereign. Being an attribute of external sovereignty, it passed directly to the Union from Great Britain, and is a power to be exercised by the political departments of the Government. *Fong Yue Ting* v. *United States*, 149 U.S. 698, 713; *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304, 315-322; *Tiaco* v. *Forbes*, 228 U.S. 549; *The Chinese Exclusion Case*, 130 U.S. 581, 606-609.

In the first deportation case to come before this Court, *Fong Yue Ting* v. *United States*, *supra*,[33] it was held that this plenary sovereign power was possessed by the United States Government, and that a decision of Congress to expel a class of aliens is a political decision which the judiciary cannot review. In that case the constitutional conten-

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[33] Previously the Court had held in *The Chinese Exclusion Case*, *supra*, 130 U. S. 581, that a determination by Congress to exclude a class of aliens is a political decision and "conclusive upon the judiciary" (130 U. S. at 606). This case held that an alien who had lawfully resided in the United States for 12 years acquired no vested right to reenter after a visit abroad even though he had been issued a certificate when he left entitling him to reenter, which was revoked during his absence by statute. Whatever license the alien may have obtained to reenter the United States was "held at the will of the government, revocable at any time, at its pleasure" (130 U. S. at 609). See also *United States ex rel. Knauff* v. *Shaughnessy*, 338 U. S. 537, where the Court recently held that it was not within the province of any court, unless authorized by law, to review the determination of the political branch of the Government that an alien came within the class excluded by statute. The latter holding does not apply to resident aliens. See discussion, *infra*, p. 64.

tions now made by appellants were exhaustively argued,[34] and all were rejected by the Court.

The three appellants there, Chinese laborers, had legally entered the country with the intention of taking up permanent residence, each having resided here for more than ten years. After their entry, further admission of Chinese laborers was prohibited. 22 Stat. 58; 23 Stat. 115; 25 Stat. 504. The *Fong Yue Ting* case grew out of the Act of May 5, 1892 (27 Stat. 25), which was designed to prevent Chinese laborers from illegally entering the United States. It required all resident Chinese laborers who were lawfully entitled to remain in the United States to secure a certificate of residence from the collector of internal revenue within one year after the passage of the Act, and provided for the deportation of any such Chinese found without a certificate. Two of the appellants had made no attempt to obtain a certificate. The third, however, had applied to the collector for the certificate but had been denied it because he was unable to prove his right to remain here by a white witness, as required by the statute and regulations, although he could, and did, prove that he was entitled to remain by Chinese witnesses.

After reviewing "the statements of leading com-

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[34] See not only the majority and minority opinions but also the two briefs submitted on behalf of the appellants, each consisting of more than 90 printed pages. No. 1345, October Term, 1892.

mentators on the law of nations" and the British authorities (pp. 707-711), the Court concluded that "The power to exclude aliens and the power to expel them rest upon one foundation, are derived from one source, are supported by the same reasons, and are in truth but parts of one and the same power" (p. 713). Consequently, it held, in accordance with its prior decision in *The Chinese Exclusion Case, supra*, that "The power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government." (149 U.S. at 713.)

In the course of the opinion the Court said with respect to its functions concerning political decisions (149 U.S. at 712):

> In exercising the great power which the people of the United States, by establishing a written Constitution as the supreme and paramount law, have vested in this court, of determining, whenever the question is properly brought before it, whether the acts of the legislature or of the executive are consistent with the Constitution, it behooves the court to be careful that it does not undertake to pass upon political questions, the *final decision* of which has been committed by the Constitution to the other departments of the government. [Emphasis added.]

The Court accordingly concluded that (149 U.S. at 731)—

> The question whether, and upon what conditions, these aliens shall be permitted to remain within the United States being one to be determined by the political departments of the government, the judicial department cannot properly express an opinion upon the wisdom, the policy or the justice of the measures enacted by Congress in the exercise of the powers confided to it by the Constitution over this subject.

The Court also held that resident aliens acquire no vested right to remain in the United States, that an alien while residing here merely holds a revocable license to remain, that deportation simply terminates a privilege and does not deprive the alien of due process of law and that the provisions of the Constitution with respect to trial and punishment do not apply to deportation (pp. 707-709, 730). These propositions necessarily follow from the fact that a decision of Congress to deport a class of aliens is a political question, "the final decision of which has been committed by the Constitution to" Congress, which decision cannot be reviewed by the courts. Cf. *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537; *Ludecke* v. *Watkins*, 335 U.S. 160.

No decision of this Court has modified these principles. Indeed, the Court has frequently re-

asserted or reaffirmed the principles for which the *Fong Yue Ting* case stands.

Thus, in *Mahler* v. *Eby*, 264 U.S. 32, where a deportation act, attacked on grounds of due process and as an *ex post facto* law, was held to be constitutional, the Court said that "The sovereign power to expel aliens is political and is vested in the political departments of the Government" (264 U.S. at 40), and "The right to expel aliens is a sovereign power necessary to the safety of the country and only limited by treaty obligations in respect thereto entered into with other governments" (264 U.S. at 38). In *Bugajewitz* v. *Adams*, 228 U.S. 585, 591, the Court stated that "It is thoroughly established that Congress has power to order the deportation of aliens whose presence in the country it deems hurtful." See also *United States ex rel. Volpe* v. *Smith*, 289 U.S. 422, 425; *Tiaco* v. *Forbes*, 228 U.S. 549; *Fok Yung Yo* v. *United States*, 185 U.S. 296, 302; *Li Sing* v. *United States*, 180 U.S. 486, 495; *Japanese Immigrant Case*, 189 U.S. 86, 97-100; *Wong Wing* v. *United States*, 163 U.S. 228, 231, 237; *Lem Moon Sing* v. *United States*, 158 U.S. 538, 545.

In *Tiaco* v. *Forbes*, 228 U.S. 549, the Governor General of the Philippines, without legislative authority, expelled 12 resident Chinese aliens after finding upon investigation that they were a menace to public order. Three of them returned, sued the Governor for damages and requested that he be

enjoined from again deporting them which he was threatening to do.[35] After the suit was brought the Philippine legislature passed an act ratifying the action of the Governor in deporting the twelve aliens. Acts of Phil. Leg., No. 1936, April 19, 1910. The aliens contended that the deportation was in violation of both the United States Bill of Rights and the Philippine Bill of Rights (32 Stat. 691), which were similar. Mr. Justice Holmes, speaking for a unanimous Court, concluded that any defect in the authority of the Governor was cured by the statute. "Therefore the deportation is to be considered as having been ordered by the Governor General in pursuance of [the] statute of the Philippine legislature directing it * * *." "[I]t is unnecessary to consider whether he had authority by virtue of his office alone * * * or whether, if he had not, he had immunity from suit for such an official act done in good faith." (228 U.S. at 556.) In deciding the case in favor of the Governor General, the Court directly determined that the statute was valid. It reasoned that, since Congress was not prevented by the Constitution from passing such an act, the Philippine Bill of Rights did not prevent the Philippine Government from doing so. The effect of the decision is that a private deportation bill passed after there has been an investigation and determination by the

[35] The facts are fully set out in *Forbes* v. *Tiaco*, 16 Phil. 534.

executive that the aliens are undesirable residents is valid.

The cases which appellants contend have modified the *Fong Yue Ting* case [36] all involved a determination by the executive that a certain alien was a member of a deportable class previously established by the legislature, rather than a decision of Congress to deport a class of aliens whom it deemed undesirable residents. Only the latter is a political decision on a matter fundamentally affecting the public welfare. The administrative determination that a particular alien is a member of a deportable class is a domestic matter. And since, while resident in this country, an alien is accorded the protection of the Constitution (*Truax* v. *Raich*, 239 U.S. 33; *Yick Wo* v. *Hopkins*, 118 U.S. 356), the procedure employed to determine that a resident alien is a member of the class which Congress has concluded to deport must accord with procedural due process. *Japanese Immigrant Case*, 189 U.S. 86, 100; *Low Wah Suey* v. *Backus*, 225 U.S. 460, 468. See *Wong Wing* v. *United States*, 163 U.S. 228, 238; *Fong Yue Ting* v. *United States*, 149 U.S. 698, 724-725. Cf. *Ng Fung Ho* v. *White*, 259 U.S. 276. None of these cases hold, or state, that due process restricts a congressional decision to deport a class of undesirable resident aliens. Indeed, the very cases holding aliens entitled to

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[36] *Japanese Immigrant Case*, 189 U. S. 86; *Wong Yang Sung* v. *McGrath*, 339 U. S. 33.

procedural due process cite with approval the substantive constitutional doctrine of the *Fong Yue Ting* case,[37] as do other more recent decisions.[38]

A decision of Congress to deport a class of aliens whom it deems to be undesirable residents is a political decision. All the reasons which support the conclusion that the exclusion of aliens is a political act likewise show that the decision to expel a class of aliens is also political. Both powers are fundamental to sovereignty, necessary to secure a country's independence from foreign domination, aggression, or encroachment. *The Chinese Exclusion Case*, 130 U. S. 581, 606; *Fong Yue Ting* v *United States*, 149 U. S. 698, 706-708. Cf. *United States ex rel. Knauff* v. *Shaughnessy*, 338 U. S. 537, 542.

A resident alien may remain the citizen of a foreign country, entitled to its protection and subject to its jurisdiction. Willoughby, *Constitution*, 2nd Ed., Vol. I, pp. 317-318. In its relations with an alien, the United States is not bound simply by domestic law, but also by international law and treaty obligations. When an alien enters this country, the United States assumes not merely

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[37] *Japanese Immigrant Case*, 189 U. S. 86, 97, 100; *Ng Fung Ho* v. *White*, 259 U. S. 276, 281, 282; cf. *Zakonaite* v. *Wolf*, 226 U. S. 272, 275.

[38] *Mahler* v. *Eby*, 264 U. S. 32, 39; *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 318; *Eichenlaub* v. *Shaughnessy*, 338 U. S. 521, 529; *Helvering* v. *Mitchell*, 303 U. S. 391, 399; *Burnet* v. *Brooks*, 288 U. S. 378, 396; *Suhonen* v. *Wallis*, 260 U. S. 606; *Lapina* v. *Williams*, 232 U. S. 78, 88; *Bugajewitz* v. *Adams*, 228 U. S. 585, 591; *Tiaco* v. *Forbes*, 228 U. S. 549, 557.

a domestic obligation but also a foreign obligation to the country of which he is a national. For any of its acts with respect to an alien, this country may be required to answer to a foreign nation. Whether the United States should continue that foreign obligation, a source of diplomatic complaint, or should terminate it by expelling the alien, is obviously a political question. Cf. *Tiaco* v. *Forbes, supra,* where the Chinese government requested that 12 Chinese citizens be expelled from the Philippines.

Expulsion of aliens has frequently been the subject of treaties and diplomatic negotiations. 4 Moore, *Digest of International Law,* pp. 67, *et seq.; The Chinese Exclusion Case, supra,* 130 U. S. at 607-608. This fact emphasizes the political nature of the act of expulsion. Likewise, the extensive consideration which has been given to the subject by treatises on international law testifies to its international character. See *Fong Yue Ting* v. *United States,* 149 U. S. at 707-711. The power to expel aliens exists at least in part as protection against foreign dangers. It lies within the field of international relations. Thus it is a political power which is fundamental to external sovereignty. Without it the United States would have a subordinate position in the family of nations. Cf. *United States* v. *Curtiss-Wright Corp.,* 299 U. S. 304, 315-322. It follows that the determination of such questions as when the power should be exercised, and what dangers call for its exercise, is t[illegible] the political branch of the Govern-

ment, and is beyond the province of the judiciary. Cf. *Ludecke* v. *Watkins*, 335 U. S. 160. "These are matters of political judgment for which judges have neither technical competence nor official responsibility" (335 U. S. at 170).

It is not to be assumed that Congress will arbitrarily exercise this absolute power. As this Court said in the *Ludecke* case with respect to a similar power (335 U. S. at 172)—

> Such great * * * powers may be abused, no doubt, but that is a bad reason for having judges supervise their exercise, whatever the legal formulas within which such supervision would nominally be confined. In relation to the distribution of constitutional powers among the three branches of the Government, the optimistic Eighteenth Century language of Mr. Justice Iredell * * * is pertinent:
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> > "All systems of government suppose they are to be administered by men of common sense and common honesty. In our country, as all ultimately depends on the voice of the people, they have it in their power, and it is to be presumed they generally will choose men of this description; but if they will not, the case, to be sure, is without remedy. If they choose fools, they will have foolish laws. If they choose knaves, they will have knavish ones. But this can never be the case until they are generally fools or knaves themselves, which, thank God, is not likely ever to become the character of the American people." (*Case of Fries* [9 Fed. Cas. No. 5126], at p. 836).

C. WITH RESPECT TO MATTERS ESSENTIALLY RELATING TO FOREIGN AFFAIRS, OF WHICH DEPORTATION IS ONE, EXCEPTIONALLY BROAD POWERS HAVE TRADITIONALLY BEEN RECOGNIZED AS VALID.

In *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, this Court carefully distinguished the powers of the United States in domestic affairs from its powers in the field of foreign affairs. The Court pointed out that constitutional restrictions on congressional delegations of power to the executive in the former field are far more stringent than in the case of the latter for the reason that, whereas Congress derives from the states its power to legislate in domestic matters, it possesses its legislative power in the realm of foreign affairs as an intrinsic attribute of sovereignty, inherited directly from the British Crown on the occasion of the separation of the colonies as a unit from Great Britain (299 U. S. at 315-317). "It results," said the Court (299 U. S. at 318), "that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. * * * As a member of the family of nations, the right and power of the United States in that field are equal to the right and power of the other members of the international family." Among such powers possessed by the Government, not derivatively from the states, but as an inherent attribute of sovereignty, the Court included (*ibid.*) the powers to declare

and wage war, conclude peace, make treaties, maintain diplomatic relations with other sovereigns, acquire territory by discovery and occupation, "*expel undesirable aliens,*" etc. (citing *Fong Yue Ting* v. *United States, supra*). In the cases cited, said the Court, it had recognized that those powers "exist as inherently inseparable from the conception of nationality," and "found the warrant for its conclusions not in the provisions of the Constitution, but in the law of nations" (*ibid.*).

International law does not limit the power of a sovereign state to expel undesirable aliens as stringently as the police power is restrained by the Constitution. While it recognizes that a sovereign state has the absolute right to expel any or all aliens, the nation may be subject to a diplomatic complaint when it arbitrarily expels an alien or the expulsion is carried out in a harsh manner. Thus, an expulsion without a hearing or simply for personal reasons of the executive is improper, as is an expulsion because of religious faith. So also is an expulsion where the alien is not given an opportunity to conclude his personal affairs or to protect his property. See 4 Moore, *International Law Digest*, pp. 67-137; 2 Wharton, *International Law Digest*, 2d ed., pp. 517-528; Bouvé, *Exclusion and Expulsion of Aliens*, pp. 3-14. But a sovereign state has extensive latitude in determining that a foreigner is an undesirable resident. See *Fong Yue Ting*, 149 U.S. at 707-711. It is not subject to the limitations imposed on Congress when it exercises

a domestic power, but is "only limited by treaty obligations * * * entered into with other governments". *Mahler* v. *Eby*, 264 U.S. at 39.

D. THE STATUTE AS CONSTRUED AND APPLIED TO APPELLANTS IS NOT AN ARBITRARY EXERCISE OF THE CONGRESSIONAL POWER.

The principles and authorities discussed heretofore establish that the determination of what classes of aliens shall be permitted to remain in the United States is committed to Congress, and that in making that determination Congress exercises plenary sovereign authority. Whether or not this power is absolute, as the decisions indicate and as Congress believed,[39] need not be determined in

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[39] Congress has expressed its own views as to its power over aliens as follows (S. Rep. 2230, 81st Cong., 2d Sess., p. 26):

> It is well established by numerous decisions of the Supreme Court that every sovereign nation has the power, inherent in its sovereignty, to forbid the entrance of aliens or to admit them upon such conditions as it may prescribe (*United States ex rel. Knauff* v. *Shaughnessy*, Supreme Court, Jan. 16, 1950; *Nishimura Ekiu* v. *United States*, 142 U. S. 651, 1892). A corollary to that essential power for its self-preservation is the inherent power of a sovereign to deport aliens. (See *Tiaco* v. *Forbes*, 228 U. S. 549, 1913.) The authority of Congress over the admission of aliens is plenary, and it may exclude them altogether or prescribe the terms and conditions upon which they may enter and remain in the country. (See *Lapina* v. *Williams*, 232 U. S. 78, 1914; *Wong Wing* v. *United States*, 163 U. S. 228, 1896.)

See also the following statement by Senator Ashurst during the debate on the 1940 Act (86 Cong. Rec. 8345):

> The United States has plenary power to invite any alien here it chooses to invite, and to exclude an alien at any

these cases. For, as the Second Circuit stated in the *Harisiades* case (No. 43, R. 993):

> Even if the power be not absolutely unlimited and if we assume that a statute would be invalid which directed deportation for some cause having no rational relation to the public welfare, as, for example, that all blue-eyed aliens be deported, this is not such a case. The statute here involved is directed against those who have at any time confederated to overthrow the Government by force, and we hold that its present application is not unconstitutional. No society need continue to harbor aliens who have joined a group who propose to destroy the society itself. This appellant joined the group voluntarily and at a time when membership in such an organization was ground for expelling him from the country.

Appellants' argument that the statute violates the First and Fifth Amendments rests in large part on the assertion that it has no rational basis, and the contention that the law constitutes punishment barred by the *ex post facto* clause is based partly on the same premise. Accordingly, before discus-

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time for a good reason, for a bad reason, or for no reason at all. The United States has full power, acting within its sovereignty, and it is not a breach of any alien's constitutional rights, to bar him at any time for any reason, or for no reason. In other words, a citizen need not give a reason why he invites a guest, and upon a guest there is certainly imposed the duty of behaving himself as well as the family behaves itself, and if an alien misbehaves, the sovereign plenary power of the Government is complete and full to exclude him at any time.

sing the legal aspects of these contentions, we will show that Congress had a reasonable basis for denying the privilege of residence in the United States to past members of subversive organizations. Needless to say, the question is not whether the Judiciary, or the Executive for that matter, would have made the same choice, or whether they would agree that Congress has acted wisely.

No one disputes, of course, that there would be good reason for deporting aliens who are presently members, with full knowledge of the aims, of an organization advocating violent overthrow of the United States Government (hereinafter sometimes referred to as "subversive organization"). Appellants attack the statute on the ground that it requires deportation of past members of such organizations, without regard to whether the alien remains a member, and without regard for whether he is proved to have personally advocated forcible overthrow or to have been aware that the organization so advocated. Several reasons caused Congress to conclude that the public welfare required deportation even in such cases, as the history of the Act of 1940 and its reenactment in the Internal Security Act of 1950 plainly show. We shall let Congress speak for itself.

1. The bill which became the amendment of 1940 was before Congress when *Kessler* v. *Strecker*, 307 U.S. 22, was decided in 1939. The sponsors of the legislation, Representatives Smith of Virginia and

Hobbs of Alabama, believing that the decision holding past membership in a subversive organization not to be grounds for deportation was contrary to what they regarded as "the clear language of the [prior] law" (84 Cong. Rec. 10449; Hearings before Subcommittee of the Senate Committee on the Judiciary, 76th Cong., 3d Sess., on H.R. 5138, p. 14)[40] inserted in the bill then before the House a provision which would make the legislative intent clear beyond peradventure (Hearings, *supra*, p. 12).

In explaining the reason for the amendment, it was repeatedly stated that the *Stracker* decision permitted an alien to evade deportation by resigning from the organization before the Government could catch up with him. Thus, Representative Smith stated (84 Cong. Rec. 9537):

> This amendment changes that so as to avoid the situation where a person who, upon being suspected, could resign from that organization and say, "I was a member of that organization last week but I have resigned and you cannot deport me." That is exactly the situation under the law in the Stracker case. This makes it plain that a person who advocates the overthrow of this Government by force, and belongs to a party that recommends that to its people, shall be deported whether he

[40] Representative Hobbs stated that "with all due respect, that seems to be a rather strained construction" (84 Cong. Rec. 10449).

belongs to it now or whether he belonged to it yesterday or last year, if he is an alien.

Representative Hobbs, in explaining the House bill before the Senate Committee (Hearings, *supra*, p. 16), had previously declared:

> We do not believe that because "Joe" Strecker, after the third hearing which was granted to him by law, and the adroit coaching of his lawyer, which is admitted in the record, said, "Why, I had my fingers crossed; I have quit; I have resigned"—we do not think that is any reason on earth to keep "Joe" Strecker here, * * *.

Representative Robsion of the House Judiciary Committee stated in the same connection (84 Cong. Rec. 10367):

> Those opposing this bill want the law to remain as it is. It provides for the deportation of Communists, anarchists, and so forth, but a recent decision of the Supreme Court in the noted Strecker deportation case held that the Government would have to prove that these aliens were anarchists or Communists at the time deportation proceedings were instituted. These Communists and anarchists and other such groups seeking to overthrow this Government, found a way to get around the law. Their leaders advised their members to say when they were arrested, "Yes, we did belong to the Communists or anarchists, but some time ago we resigned. We decided not to belong to the organization any longer."

> Strecker, a Communist alien, was apprehended. He readily admitted that he had been a Communist, he had his membership card, but claimed that he had recently resigned from that party. The Supreme Court held that in view of that statement Strecker could not be deported.
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> * * * * * * *
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> * * * Without this new law, anarchists, Communists, and other like organizations will continue to flourish and grow and endanger the very life of this Nation, its citizens, and their property.

Representative Blackney summarized the view which prevailed as follows (p. 10365):

> This amendment changes that so as to avoid the situation where a person, who, upon being suspected, could resign from that organization and say, "I was formerly a member of that organization, but I have now resigned."[41]

Thus Congress had very good reasons for making past membership in the party grounds for deportation. It realized that voluntary withdrawal

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[41] During the debate on the Anarchist Deportation Act of 1918, Representative Burnett, Chairman of the House Committee on Immigration and Naturalization, rejected a suggestion that deported subversives be permitted to return, upon a showing that they had "sincerely reformed," stating (56 Cong. Rec. 8122):

> "I think not; and I do not think we should adopt anything that would, because it would open the door to too many cases of *pretended reformation*." (Italics added.)

from membership may often be a mere subterfuge, not affecting adherence to fundamental principles.

2. Congress realized that the 1940 amendment might reach aliens who had reformed, but felt nevertheless that such aliens were undesirable aliens not entitled to the continued hospitality of this country. In successfully opposing an amendment which would have excepted persons who had abandoned membership in good faith for five years, Representative Hobbs declared (84 Cong. Rec. 10448-9):

> I shall give the underlying philosophy of this section. It is that in this day and time we have floods of applications from perfectly good aliens who want to come here and make their homes and make the same splendid contribution to our civilization that good aliens have throughout the ages. This country has been builded by good aliens who have come here and have worked wonderfully with the good people of this Nation.
>
> We are all aliens, if you trace the family tree far enough, so we have no prejudice against aliens. With the world to select from, with the cream of the alien world seeking admission, when we are unable to accommodate millions because of our quota limitations, why not select the best? Why insist upon keeping some of the worst? They may have sinned only once, but there are thousands who have never sinned. I prefer those. You may as well say that one slip, one sin, does not militate against chastity. No matter how long since, nor for

how short a time, anyone may have knowingly and voluntarily strayed from the straight and narrow path of virtue, he cannot be sinless. Of course there is virtue in sincere repentance. Many really reform. Forgiveness is a divine attribute, which we should practice whenever possible. We are perfectly willing to forgive every one of those aliens who brought or bring themselves within the purview of this title. This title inflicts no punishment upon any of them; it says to them, "Go and sin no more."

They came to our home and plotted the destruction of our Government that bade them welcome, but all we do here is to send them—not to prison or gallows—but back to their own home.

Though we deal only in such kindly fashion with them, we feel in duty bound to prefer those who have never been guilty of allowing themselves to be inoculated with the poison virus of those aliens isms that seek to destroy our Government by violence. That is the issue.

See also the Senate Hearings, *supra*, pp. 14-15, in which Representative Hobbs stated:

Now, then, is that harsh? We think not, and for this reason, Senator Danaher—since this was your question, I am directing my answer primarily to you—for this reason: This is not a question of a criminal prosecution. This is not a question of dealing with the vested rights of anyone. No alien has any vested right to remain here. * * *

Now, the thought back of this amendment is simply this—that we have at this time in the history of the world the rarest opportunity that has ever come to America to select the best of those who wish to come here, and every one of these who has been at any time a member of a subversive faction advocating the overthrow either of all government or of this Government can well be replaced from the standpoint of the good of America by someone who has never been diseased with that mania. In other words, say that I was in Italy before I came here; I am an immigrant; say that I was a member of the Communist Party, and I believed wholeheartedly in its principle of the destruction of all organized government; I am an anarchist; I am one of the dirk wielders; I am one of the strong-arm boys. Now, I get religion, or any other uplifting influence comes into my life, or I completely recant. Well, that may be permanent, or it may not; but we said we would rather had one who had never been; and it is our choice. Now, there are plenty of good people in Italy who have never sinned in that regard; who have always believed in some established government; who have never sunk a dirk in one's back.

He also stated (84 Cong. Rec. 10359):

Aliens in the United States are exactly analogous to visitors in your home. No guest in your home has the same rights as do your children. They have no vested right to remain here.

In short, Congress may select and limit the number and kind of aliens it wishes to allow to remain in the United States; aliens who were at any time connected with a subversive organization are less desirable than others; although such aliens may reform, past members of such organizations are more likely to be susceptible in the future to the "poison virus" and therefore to become dangerous, or at least undesirable, residents of the United States. Even though this may not be true of all of them, classifying the group as such as undesirable for purposes of deportation is not an arbitrary or irrational judgment.

3. This latter conclusion has particular significance as of 1950 when Congress reexamined the whole question of the Communist threat in enacting the Internal Security Act which, *inter alia*, reenacted the provisions here in issue. Congress found a direct connection between alienage and susceptibility to Communist propaganda.

That the Communist Party had become a greater menace to the United States by 1950 than in the 1930's does not require more than the bare statement. Both the increased power of the U.S.S.R. throughout the world and its expressed hostility toward the United States have undoubtedly aggravated the harm which can be accomplished by aliens sympathetic with the Communist cause. Indeed, since June 25, 1950, the battle has become in part a military one, and the possibility of external

conflict with communist nations, supported within the United States by their domestic adherents, can no longer be regarded as remote and speculative. In the light of these well know facts, Congress reexamined the entire problem when it enacted the Internal Security Act. Its findings are set forth in Section 2 of that Act, the most pertinent of which for present purposes are set forth below.[42]

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[42] "(1) There exists a world Communist movement which, in its origins, its development, and its present practice, is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization.

* * *

(4) The direction and control of the world Communist movement is vested in and exercised by the Communist dictatorship of a foreign country.

(5) The Communist dictatorship of such foreign country, in exercising such direction and control and in furthering the purposes of the world Communist movement, establishes or causes the establishment of, and utilizes, in various countries, action organizations which are not free and independent organizations, but are sections of a world-wide Communist organization and are controlled, directed, and subject to the discipline of the Communist dictatorship of such foreign country.

(6) The Communist action organizations so established and utilized in various countries, acting under such control, direction, and discipline, endeavor to carry out the objectives of the world Communist movement by bringing about the overthrow of existing governments by any available means, including force if necessary, and setting up Communist totalitarian dictatorships which will be subservient to the most powerful existing Communist totalitarian dictatorship. Although such organizations usually designate themselves as political parties, they are in fact constituent elements of the world-wide Communist movement and promote the objectives of such move-

The particular facts which necessitated strengthening the immigration and deportation laws are stated in Senate Committee Report No. 2230, 81st

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ment by conspiratorial and coercive tactics, instead of through the democratic processes of a free elective system or through the freedom-preserving means employed by a political party which operates as an agency by which people govern themselves.

* * *

(9) In the United States those individuals who knowingly and willfully participate in the world Communist movement, when they so participate, in effect repudiate their allegiance to the United States, and in effect transfer their allegiance to the foreign country in which is vested the direction and control of the world Communist movement.

(10) In pursuance of communism's stated objectives, the most powerful existing Communist dictatorship has, by the methods referred to above, already caused the establishment in numerous foreign countries of Communist totalitarian dictatorships, and threatens to establish similar dictatorships in still other countries.

(11) The agents of communism have devised clever and ruthless espionage and sabotage tactics which are carried out in many instances in form or manner successfully evasive of existing law.

* * * *

(15) The Communist movement in the United States is an organization numbering thousands of adherents, rigidly and ruthlessly disciplined. Awaiting and seeking to advance a moment when the United States may be so far extended by foreign engagements, so far divided in counsel, or so far in industrial or financial straits, that overthrow of the Government of the United States by force and violence may seem possible of achievement, it seeks converts far and wide by an extensive system of schooling and indoctrination. Such preparations by Communist organizations in other countries have aided in supplanting existing governments. The Communist organization in the United States, pursuing its stated objectives, the recent successes of Communist methods in other countries, and the nature and control of the world Communist movement itself, present a clear and present danger to the security of the United States and to the existence of free American institutions, and make it necessary that Congress, in order to provide for the common defense, to preserve the sovereignty of the United States as an independent nation,

Cong., 2d sess.[43] This report describes the use by the Communist International of (pp. 10-11):

> * * * a network of agents whose sole function is to organize and promote Communist activity, sabotage, espionage, propaganda, and terrorism. These agents are sent into the United States and other countries under the policy of the Communist high command. Although some of the agents are native-born Americans or have acquired citizenship through naturalization, a large majority of them are aliens.
>
> * * * * *
>
> * * * it is not strange that the vast majority of those who would establish a Communist dictatorship in this country come from alien lands; and it is easy to see that the forces of world communism must have or find ways and means for getting their minions into this country if they are to maintain the effectiveness of their organization here.
>
> The Comintern realizes that it cannot rely on native Americans because to do so involves the constant risk of having its work impeded or exposed. It is to be expected that the loyalty of a native American or of a citizen of long standing would occasionally reassert

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and to guarantee to each State a republican form of government, enact appropriate legislation recognizing the existence of such world-wide conspiracy and designed to prevent it from accomplishing its purpose in the United States."

[43] This was the report on S. 1832, the immediate predecessor of the immigration and deportation sections in the Internal Security Act. For similar remarks by Senator McCarran, see 96 Cong. Rec. (daily ed.) 14170 *et seq.*

itself, despite the most intensive Communist indoctrination.

The break with the Communist Party by men like Louis Budenz, Howard Rushmore, Jay Lovestone, Benjamin Gitlow, and others offers conclusive proof to Moscow that it can only rely on its chosen agents for the work of destroying America. In the event of a clash of arms between the Soviet homeland and this country, the Communists would find it even more difficult to rely upon native Americans and those of foreign origin who become Americanized.

It was pointed out by former Communists that (p. 12):

> * * * the party was controlled by aliens or persons of foreign origin because of the profound distrust of Moscow for native Americans. "A Communist of American background" is regarded in the party with definite suspicion. * * *
>
> It is a well-established fact that both the leadership and membership of the Communist Party is recruited overwhelmingly from alien ranks. During the course of its 30 years of existence in this country the Communist Party has been ruled exclusively by alien agents appointed by the Communist International headquarters in Moscow.
>
> The high command of the party in this country invariably has been dominated by aliens or persons of foreign origin. These facts have

been documented by the testimony presented before the subcommittee.

* * * * *

[p. 14] Another native American who broke with the Communist Party is Paul Crouch. In his 17 active years in party work, he learned that—

> the vast majority of those persons who direct the United States branch of the Communist International [that is, the Communist Party of the United States] are foreign-born persons who are not naturalized citizens of this country. * * * Native born and naturalized American Communists, in the main, are nominal party officials and are used mostly to head the various party fronts.
>
> With few exceptions, however, when an American member is taken into the real top circles of the party, it proves disappointing to Moscow. Most Americans who were admitted to the higher circles of party leadership were disgusted and nauseated at what they found there.

Crouch agreed with the statement that if the Communist Party were deprived of its alien elements "this Communist Party would not amount to much."

The Committee concluded, on the basis of evidence of which the above is but a small sample, that (p. 16):

> * * * the conclusion is inescapable that the Communist Party and the Communist movement in the United States is an alien movement, sustained, augmented, and controlled by

European Communists and the Soviet Union. The severance of this connection and the destruction of the life line of communism becomes, therefore, substantially an immigration problem.

A reasonable means of severing "the life line of communism" was both to preclude the entry and to require the removal of aliens connected with the party. Since the security of the United States was at stake, effective steps in this direction were necessary. Certainly, it was reasonable for Congress to believe that it would not be sufficient merely to remove aliens presently members of the party. The fact disclosed by the present cases that since 1939 aliens have been ineligible for membership irrespective of their continued willingness to cooperate is sufficient to establish that withdrawal from membership does not necessarily mean a change of heart. Voluntary withdrawal from membership may often be a mere subterfuge, not affecting fundamental adherence to subversive principles.

The cases before the Court afford examples of the very situations which Congress was trying to reach. The *Harisiades* and *Coleman* records (No. 43, R. 46; No. 264, R. 12, Tr. 43) reveal that those appellants left the Communist Party in 1939 and 1938 because of a Party policy to exclude aliens from membership—obviously for the purpose of preventing their deportation. Coleman continued to attend Party functions after she withdrew from membership (No. 264, Tr. 44, 62), and there is

reason to believe that her personal views had not changed.[44] As to Harisiades, who held important positions in the Party, the record is clear that termination of his membership because of this policy did not alter his attitude (No. 43, R. 46-7). He does not claim to have reformed; he asserts that he still has "the same ideas" he had when he was an active member of the Communist Party (R. 47), which he left involuntarily. He is as undesirable a resident today as he was in 1930.

The difficulties in the way of determining whether a former member of a subversive organization has completely abandoned the connection which might make him a dangerous resident are obvious. Congress could thus rationally decide that an alien, who has once shown himself to be so unattached to this country and so open to outside influence as to be willing to join a subversive organization, is a potentially dangerous type of person to whom this country should not wisely extend its hospitality. See *Turner* v. *Williams*, 194 U. S. 279, 294; *Lopez* v. *Howe*, 259 Fed. 401 (C.A. 2), appeal dismissed and certiorari denied, 254 U. S. 613, 650; *Ex parte Pettine*, 259 Fed. 733 (D. Mass.). It could decide that such persons, readily affected by organized propaganda, might prove to be unstable elements in time of stress. It could, therefore, rationally decide that it was necessary to the welfare of the United States to terminate the residence of such aliens.

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[44] Her testimony indicates that she was either extremely ignorant or not entirely candid. See p. 49, n. 29, *supra*.

To make deportability turn on a former member's personal belief in violent overthrow of the Government or personal knowledge that the Party advocated such a policy would present even more difficult problems of proof. It is simple enough even for an officer of the Party, such as Harisiades, to deny that he or the Party believed in the affirmative use of force or violence. As the records in the *Dennis* [45] and *Schneiderman* [46] cases show, this is the official line followed by the leaders of the Party. Nevertheless, Congress was entitled to believe and to act on the assumption that most, if not all, voluntary members of a thoroughly regimented and disciplined organization such as the Communist Party, which in itself advocates violent overthrow of the Government, will be aware of and in agreement with the organization policy, whatever they may assert on the witness stand.[47] Indeed, Representa-

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[45] *Dennis* v. *United States*, 341 U. S. 494. See especially 183 F. 2d 201, 206 (C.A. 2).

[46] *Schneiderman* v. *United States*, 320 U. S. 118. The postulate of the *Schneiderman* case that beliefs are personal was addressed to the naturalization statute's requirement of attachment to the principles of the Constitution, which was clearly addressed to beliefs.

[47] See Mr. Justice Jackson, concurring, in *Dennis* v. *United States*, 341 U. S. 494, 564:

> The Communist Party, nevertheless, does not seek its strength primarily in numbers. Its aim is a relatively small party whose strength is in selected, dedicated, indoctrinated, and rigidly disciplined members. From established policy it tolerates no deviation and no debate.

See also Mr. Justice Jackson's opinion in *American Communications Ass'n* v. *Douds*, 339 U. S. 382, 432, quoted at p. 100, *infra*.

tive Walter stated during the debate on the 1951 amendment (97 Cong. Rec. (daily ed.) 1416-1417):

> There is no way of telling whether or not a man was an innocent or involuntary member of a Communist organization. I may say that the easiest thing a Communist does is to lie. * * * There is no way of telling whether or not a person who comes forward today and says, "I was an innocent member of a Communist organization" is telling the truth.

It has been possible in some cases for these professions of innocence to be disproved, as in the *Dennis* case itself. But the magnitude of the trial required to prove personal knowledge and advocacy of a policy of violence by even the Party's top leaders demonstrates that in practical effect the Party's line of defense could thwart protection of the nation against aliens who were seeking to overthrow its institutions by force if proof of personal belief in, or knowledge of, the policy of violence was needed. Certainly, Congress could reasonably so conclude.

The Senate Committee Report (No. 2230, *supra*) shows that Congress was concerned both with the less difficult, but still very "formidable" problem of proving what the organization itself advocates and with proving the "real intentions" of individuals. The Report states in this connection (p. 24):

> * * * there is the obvious difficulty of establishing that certain aliens or organizations do

> advocate overthrowing the Government by force or violence. It is inherent in the tactics of such persons and organizations that their real intentions be concealed under an aura of legitimacy in order to accomplish their purpose. Thus, though it may be common knowledge that certain organizations advocate such beliefs, satisfactory proof of that position offers a formidable obstacle. * * *

Thus, it cannot be said that because there is no proof that a member or former member of the Party seeks the violent overthrow of the Government, that he is not a potential danger to the United States. The fact that he was a member affords Congress a rational basis for believing that he is likely to cooperate in the activities of such organizations.

Moreover, the degree of danger from a subversive organization is directly related to its numbers, even though persons may no longer be members or were not consciously aware of the full implications of the program. That is particularly true in the case of a disciplined organization like the Communist Party, whose membership is trained to follow orders.[48] For example, the man who strikes pursuant to orders of a superior can be a danger to the country, even if he personally thinks the strike is legitimate and is unaware that the strike is called for a political purpose. Cf. *Ameri-*

[48] See notes 42, 47, *supra*, pp. 80, 87.

can Communications Association v. *Douds, supra.* Similarly, a man can obey orders which he does not understand and in that manner commit espionage and sabotage. Indeed, petitioner Harisiades himself, though asserting that the Communist Party had not taught the forcible overthrow of the Government, and that he did not believe in it, refused to deny that "if directed by your Communist Party superiors during the period of your membership to take an active part in the overthrow of the existing United States government by force, were you ready to do so?" (R. 46.) A member might be used, as was petitioner Harisiades (R. 29-30), to recruit new members who may become through Party training ardent believers in violent overthrow of the Government. There is no reason to believe that he would be less cooperative if a demand for his assistance arose merely because his formal membership had ceased. Any organization needs members, followers as well as leaders, and a blind follower may often be more useful than a questioning one.

It must be remembered that Congress was not setting up a standard of personal guilt. It was classifying aliens whom it deemed undesirable residents of the country.

These factors demonstrate that Congress was not acting arbitrarily when it did not base its conclusion as to deportability upon proof of the subjective beliefs of the voluntary members of subversive

organizations. As the Second Circuit stated in the *Harisiades case* (No. 43, R. 993):

> * * * there is nothing in the Constitution which imposes upon deportation officials the difficult and uncertain task of distinguishing between those members of a subversive group who individually advocate the forbidden course and those who do not. The interest to be preserved of those who do not personally advocate the illegal means is at most the privilege of joining the group, and this is not of enough importance to outweigh the public interest in a workable rule which avoids the administrative difficulties of making a separation between those who do and those who do not favor the illegal objective of the group.

This does not deny, of course, that some former members of the organization may have been unaware of or not in personal agreement with the policy of forcible overthrow. On these records, it must be assumed that there is no proof that these appellants had such personal beliefs or knowledge. In view of its interpretation of the statute as not requiring proof of more than past membership and the nature of the organization, the Immigration Service has not deemed it necessary to introduce evidence on these subjective matters in its deportation proceedings.

The question therefore, is whether in the exercise of its plenary power over aliens Congress may require the deportation of a class, some of whose

members as individuals cannot be said to be dangerous to the United States. Congress believed that the fact of former membership alone was sufficient to make aliens undesirable residents, as Representative Hobbs' statements quoted at pp. 76-78 *supra*, show. But apart from that, and looking at the matter from the standpoint of national security alone, Congress was called upon to weigh the possible harm to the safety of the United States if former alien members of a subversive organization could not be deported—for that would in practical effect be the consequence of requiring proof of present membership or of personal knowledge or belief—as against the undoubted hardship which deportation will inflict upon some members of the class who may not have had subversive beliefs and may not have them now. In making that determination Congress could properly take into account both that an alien has no vested right to remain in the United States and that its primary responsibility is to protect the safety of the United States as a whole—not only the physical safety of all its inhabitants, but also the maintenance of our free system of Government under the Constitution as against those who would overthrow it. Congress is not exercising an unreasonable judgment when it places the national welfare over those of the affected aliens.

In many other fields of the law, innocent persons have been held lawfully subject to controls necessitated for the well-being of the community as a

whole. The Japanese relocation cases, which involved the removal of American citizens, are extreme examples. *Hirabayashi* v. *United States*, 320 U. S. 81; *Korematsu* v. *United States*, 323 U. S. 214. *Hawker* v. *New York*, 170 U. S. 189, upheld a state law preventing a doctor from practicing medicine by reason of a conviction of crime years before the law was passed. This Court's decision recognized the necessity of testing the character of the class as a whole, even though some of its members might have reformed, saying (170 U. S., at 197):

> It is no answer to say that this test of character is not in all cases absolutely certain, and that sometimes it works harshly. Doubtless, one who has violated the criminal law may thereafter reform and become in fact possessed of a good moral character. But the legislature has power in cases of this kind to make a rule of universal application, and no inquiry is permissible back of the rule to ascertain whether the fact of which the rule is made the absolute test does or does not exist. * * *

In *Purity Extract Co.* v. *Lynch*, 226 U. S. 192, 201, the Court said:

> * * * It does not follow that because a transaction separately considered is innocuous it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the Government.

This principle has often been reaffirmed. E.g., *Westfall* v. *United States*, 274 U. S. 256, 259; *Clarke* v. *Deckebach*, 274 U. S. 392, 397; *Korematsu* v. *United States*, 323 U. S. 214, 218-219; *American Communications Ass'n* v. *Douds*, 339 U. S. 382, 392, 419.

The general national welfare will not ordinarily permit legislation which deprives persons of civil rights guaranteed by the Constitution. But an alien has no such right to remain in the United States. Accordingly, we submit that it is within the Congressional power to enact a statute, calculated effectively to expel a class of undesirable aliens from the country, even though it may operate harshly in particular cases.

The statute in this respect is not unlike that involved in the *Fong Yue Ting* case, *supra* (149 U. S. 698). The purpose of that act was to prevent further immigration of Chinese laborers to the United States, not to expel those already residing here. Because of the difficulty of distinguishing the resident Chinese from those who were illegally entering the country, due to their similarity in physical appearance, the act required resident Chinese to secure a certificate of residence. Since the Chinese were thought not to understand the obligations of an oath, they were required to prove their right to remain in the country by a white witness. If they failed to secure the certificate, they were to be deported. Although the object was not to deport resident aliens, this Court held that Congress

could validly find that the system established by the statute was the only effective method of preventing the country from being overrun by Chinese laborers who were entering illegally.[48a]

The Congressional judgment to expel all past or present members of a subversive group, even if only for the purpose of effectively deporting those who are personally subversive, is obviously more rational than the Chinese act. It is much more difficult to distinguish between those who have or have not changed their views or who did or did not have a particular knowledge, than it is between members of the same race who legally or illegally entered the country. Beliefs or knowledge are always hard to determine or prove. Moreover, to permit a subversive alien to remain in the country is to leave here a far greater menace to the welfare of the nation than a Chinese laborer.

E. THE STATUTE AS CONSTRUED AND APPLIED DOES NOT CONTRAVENE THE FIRST OR FIFTH AMENDMENTS.

The constitutional arguments advanced by petitioners based on the First and Fifth Amendments, are without merit, whether the power of Congress to expel classes of aliens is an absolute or limited one. As we have shown, those Amendments, as well as other provisions of the Constitution, do not apply to the political decision of Congress to expel a class of aliens whom it deems undesirable resi-

[48a] This statute was again upheld in *Wong Wing* v. *United States*, 163 U. S. 228; and see *Ah How* v. *United States*, 193 U. S. 65.

dents. The decision of Congress is final. Moreover, the power to expel aliens is an inherent attribute of sovereignty essentially relating to foreign affairs and the national safety. Such powers are not impliedly restricted by provisions of the Constitution which do not expressly relate to them.

Aside from procedural due process, attacks upon deportation statutes based on specific provisions of the Constitution have repeatedly been rejected by this Court. *Mahler* v. *Eby*, 264 U. S. 32, 37, 38-39; *Bugajewitz* v. *Adams*, 228 U. S. 585, 586, 591; *Tiaco* v. *Forbes*, 228 U. S. 549, 556; *Fong Yue Ting* v. *United States*, 149 U. S. 698, 730. See *Wong Wing* v. *United States*, 163 U. S. 228; cf. *Turner* v. *Williams*, 194 U. S. 279, 289; *The Chinese Exclusion Case*, 130 U. S. 581. Thus, in *Mahler* v. *Eby*, *supra*, a deportation act was held to be constitutional where it was attacked as an *ex post facto* law and as depriving the alien of due process of law; the Court said (264 U. S. 38-39):

> The theory of the draftsman of the petition for the writ and of the assignment of errors was that the same constitutional restrictions apply to an alien deportation act as to a law punishing crime. It is well settled that deportation, while it may be burdensome and severe for the alien, is not punishment. *Fong Yue Ting* v. *United States*, 149 U.S. 698, 730; *Bugajewitz* v. *Adams*, 228 U.S. 585, 591. The right to expel aliens is a sovereign power necessary to the safety of the country and only

> limited by treaty obligations in respect thereto entered into with other governments. *Fong Yue Ting* v. *United States*, *supra*.

Similar contentions were summarily rejected by this Court in the *Bugajewitz* case, *supra*, 228 U.S. 585, 591:

> The attempt to reopen the constitutional questions must fail. It is thoroughly established that Congress has power to order the deportation of aliens whose presence in the country it deems hurtful. The determination by facts that might constitute a crime under local law is not a conviction of crime, nor is the deportation a punishment; it is simply a refusal by the Government to harbor persons whom it does not want. * * * The prohibition of *ex post facto* laws in Article I, Sec. 9, has no application * * *

The *Fong Yue Ting case*, *supra*, 149 U. S. 698, and *Tiaco* case, *supra*, 228 U. S. 549, are to the same effect; see discussion, *supra*, pp. 58-64.

As we have shown, there is a rational connection between national safety and the removal of aliens, who, owing no fundamental allegiance to the United States, have voluntarily joined an organization dedicated to destroying the Government. The statute is logically calculated to expel those aliens from the country who have used its hospitality as a means to destroy it. This Court cannot say that any less stringent statute would effectively accomplish that purpose, and consequently

that the legislative judgment was irrational or arbitrary.

On the other hand, the abridgment, if any, of the alien's rights is very limited. The primary curtailment is of the privilege to remain here, and that is not a right which the Constitution confers on an alien. Except that he cannot remain within this country, his liberty is not restrained. The only restraining effect of the statute on an alien while he remains within this country is to prevent him from joining a subversive organization, conduct not protected since advocacy of the overthrow of the Government by force and violence is not a right protected by the First Amendment. *Dennis* v. *United States, supra.*

There has been no specific discussion by this Court of whether the power to expel aliens is subject to the prohibitions of the First Amendment. Cf., however, *Turner* v. *Williams*, 194 U. S. 279, 292. But the reasoning of the cases cited above apply with equal cogency to the First Amendment as to other provisions of the Bill of Rights. And it is significant that in *Tisi* v. *Tod*, 264 U. S. 131, and *Bilokumskij* v. *Tod*, 263 U. S. 149, deportation of aliens on a charge of having in their possession for the purpose of distribution printed matter advocating the overthrow of the government by force was upheld without discussion of the First Amendment.[49] The lower federal courts, relying on the

[49] In the *Tisi* case the alien contended that he did not know the seditious character of the printed matter.

decisions of this Court which have defined the broad power of Congress to deport classes of aliens, have not granted aliens the right to claim the protection of the First Amendment against a deportation statute. See, *e. g.*, *Lopez* v. *Howe*, 259 Fed. 401 (C. A. 2), appeal dismissed and certiorari denied, 254 U. S. 613, 650 (philosophical anarchist); *Ex parte Pettine*, 259 Fed. 733, 735-736 (D. Mass.) (same).

In any event, Constitutional rights, even First Amendment rights, are not absolute. *Dennis* v. *United States*, 341 U. S. 494. Certainly the United States is not, under our Constitution, bound to keep forever all aliens who enter its shores. Since they have no vested right to remain, the act of deportation does not in itself abridge a personal right guaranteed by the Constitution. Even with respect to a legislative judgment on a purely domestic matter affecting the public welfare, and not the curtailment of vested constitutional rights of the individual, the standard governing the power of Congress is that its judgment rest on a rational basis. See *United Public Workers* v. *Mitchell*, 330 U. S. 75; cf. *United States* v. *Carolene Products Co.*, 304 U. S. 144, 149, 154; *Carolene Products Co.* v. *United States*, 323 U. S. 18, 31. Viewed in this light, the problem is essentially that of balancing the public interest to be served and the rational relationship of the statute to accomplishment of that object against the possibility of abridgment of First or Fifth Amendment rights.

The issue here relates to the power of Congress to rely for purposes of deportability upon the fact that an alien voluntarily joined an organization which advocates violent overthrow of the Government without requiring proof that he personally adopted, or had knowledge of, its subversive aims. The statute applies to his conduct—membership in a conspiratorial organization which is subject to regulation because of what it threatens to do—not his words or advocacy or peaceable assembling.[49a] It does not prohibit that conduct nor criminally punish him for it; it merely withdraws from him a revocable privilege to remain here. It does this because he has conducted himself in such a manner as to become in the Congressional judg-

[49a] It was not irrational for Congress to base its legislation upon the same facts as were described as follows in Mr. Justice Jackson's opinion in *American Communications Association* v. *Douds*, 339 U. S. 382, 432-433:

> Membership in the Communist Party is totally different. The Party is a secret conclave. Members are admitted only upon acceptance as reliable and after indoctrination in its policies, to which the member is fully committed. * * * For any deviation from the party line they are purged and excluded.
>
> Inferences from membership in such an organization are justifiably different from those to be drawn from membership in the usual type of political party. Individuals who assume such obligations are chargeable, on ordinary conspiracy principles, with responsibility for and participation in all that makes up the Party's program. * * * There is certainly sufficient evidence that all members owe allegiance to every detail of the Communist Party program and have assumed a duty actively to help execute it, so that Congress could, on familiar conspiracy principles, charge each member with responsibility for the goals and means of the Party.

ment an undesirable resident. Revocation of an alien's privilege to remain here is not the type of curtailment of First or Fifth Amendment rights which would justify overruling the judgment of Congress in a matter vitally affecting the welfare and safety of the State.

This Court said, with respect to the statute barring Communists from union office involved in the *Douds* case (339 U. S. at 403):

> * * * There are here involved none of the elements of censorship or prohibition of the dissemination of information that were present in the cases mainly relied upon by those attacking the statute. The "discouragements" of § 9(h) proceed, not against the groups or beliefs identified therein, but only against the combination of those affiliations or beliefs with occupancy of a position of great power over the economy of the country. Congress has concluded that substantial harm, in the form of direct, positive action, may be expected from that combination. In this legislation, Congress did not restrain the activities of the Communist Party as a political organization; nor did it attempt to stifle beliefs. Compare *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624 (1943).

Here, too, there is no element of censorship or prohibition on dissemination of information. The discouragements proceed only against the combination of a subversive group with those who do not

owe full allegiance to the country. And it leaves them free to maintain their affiliations and beliefs subject only to the condition that they do so in a country to which they owe or give allegiance, and not in the country whose hospitality they have abused.

We submit that the interest of this country in terminating the residence of aliens, who by their conduct have shown that they are potentially dangerous to the welfare and safety of the country, overbalances the limited infringement on any possible personal rights of an alien. If the problem be appraised from the viewpoint of the national safety, and not merely with relation to each alien as an individual (see pp. 91-94, *supra*), the Congressional determination is valid whether the test be "clear and present danger" or some degree of reasonableness. Thus, even if the First and Fifth Amendments apply to the decision of Congress to deport a class of aliens, the statute here involved is constitutional.

F. THE ACT IS NOT INVALID AS AN EX POST FACTO LAW OR RETROSPECTIVE STATUTE.

1. A law requiring deportation is not retroactive even when the ground for deportation is past conduct. This Court has frequently held that "a statute is not retroactive merely because it draws upon antecedent facts for its operation." *Lewis* v. *Fidelity Co.*, 292 U.S. 559, 571; *Reynolds* v.

United States, 292 U.S. 443, 449; *Cox* v. *Hart*, 260 U.S. 427, 435; *Mugler* v. *Kansas*, 123 U.S. 623; *In re Rahrer*, 140 U.S. 545, 564; *United States* v. *Freight Ass'n*, 166 U.S. 290; *New York Cent. R. R.* v. *United States (No. 2)*, 212 U.S. 500; *Chicago & Alton R. R.* v. *Tranbarger*, 238 U.S. 67; *Jacob Ruppert* v. *Caffey*, 251 U.S. 264, 301; *Samuels* v. *McCurdy*, 267 U.S. 188, 193. The past conduct of a person indicates his present or future undesirability. It would, indeed, be a novel and stringent restriction on sovereignty if a state cannot remove an alien who has by his conduct clearly demonstrated that he is a dangerous person or hostile to the country, simply because that conduct was not at that time a statutory ground for deportation. No justification for such rule can be found in international law or the diplomatic practice of this or other nations. The only relevant inquiry with respect to an expulsion is whether the individual is now undesirable. Past conduct is used merely as a means of defining the aliens who, in the judgment of Congress, are presently undesirable. The entire purpose of the power is to remove undesirable aliens from the country, not to punish them.

Moreover, membership in an organization advocating the violent overthrow of the Government was a ground for deportation in all the years from 1920 to 1939 during which the conduct for which appellants are being deported occurred. Appellants are not being deported for conduct not de-

fined as a basis for deportation at the time of their membership. The activity charged was grounds for deportation for many years before any of the appellants gave up their membership in the Communist Party. Cf. *Johannessen* v. *United States*, 225 U.S. 227, 242-243, where a certificate of citizenship was cancelled on the ground that it was fraudulently and illegally procured. The statute providing for the cancellation of fraudulently and illegally procured certificates of citizenship was enacted long after the certificate was granted. The Court in holding that the statute, though retrospective, "is not to be deemed an *ex post facto* law" (225 U.S. 243) stated that "The act makes nothing fraudulent or unlawful that was honest and lawful when it was done" (225 U.S. 242).

The statute prior to 1940 fully put appellants on notice that they were subjecting themselves to deportation when they admittedly joined the subversive organization.[50] The only reason they had not been deported prior to 1940 was that they had not been caught while they were still members. The 1940 amendment is similar to the removal or extension of a statute of limitations. In civil matters, if no vested rights are involved, statutes of limitations may be removed after the action has

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[50] It should also be noted (see p. 73, *supra*) that the sponsors of the 1940 amendment believed that they were not adding anything to the prior law, but were merely correcting this Court's interpretation in *Kessler* v. *Strecker*, 307 U. S. 22.

been barred. *Campbell* v. *Holt*, 115 U.S. 620; *Chase Corp.* v. *Donaldson*, 325 U.S. 304. Petitioners have no vested right to remain in the United States.

2. Even assuming application of *ex post facto* principles, it is settled that an *ex post facto* law is one which imposes or increases punishment for past conduct, and that the *ex post facto* provisions of the Constitution have no application to civil legislation, unless the legislation, though purporting to be civil, was intended as punishment. See *Bankers Trust Company* v. *Blodgett*, 260 U. S. 647, 652; *Kentucky Union Co.* v. *Kentucky*, 219 U. S. 140, 152-153; *Johannessen* v. *United States*, 225 U. S. 227, 242; *Reetz* v. *Michigan*, 188 U. S. 505, 510; *Orr* v. *Gilman*, 183 U. S. 278, 283-286; *Hawker* v. *New York*, 170 U. S. 189; *Kring* v. *Missouri*, 107 U. S. 221, 226-227; *Locke* v. *New Orleans*, 4 Wall. 172, 173-174; *Carpenter* v. *Pennsylvania*, 17 How. 456, 462-463; *Baltimore and Susquehanna Railroad Co.* v. *Nesbit*, 10 How. 395, 401; *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 539-540; *Watson* v. *Mercer*, 8 Pet. 110; *Satterlee* v. *Mathewson*, 2 Pet. 380, 413; *Calder* v. *Bull*, 3 Dall. 386. See also Story, *Commentaries on the Constitution* (5th Ed.), vol. II, p. 218; Cooley, *Principles of Constitutional Law*, (4th Ed.), pp. 356-358; Kent, *Commentaries of American Law* (12th Ed., Holmes), vol. I, pp. 408-409; Willoughby, *Constitution*, vol. II, p. 803; Watson, *The Constitution of the United States, Its History, Application and*

Construction (1910), vol. I, p. 739; Black, *Handbook of American Constitutional Law*, p. 709; Miller, *Lectures on the Constitution of the United States* (1893), p. 585. The few cases applying the *ex post facto* rule in civil proceedings (*Fletcher* v. *Peck*, 6 Cr. 87; *Cummings* v. *Missouri*, 4 Wall. 277; *Ex parte Garland*, 4 Wall. 333; *Pierce* v. *Carskadon*, 16 Wall. 234) have been summarized as holding "that the *ex post facto* effect of a law cannot be evaded by giving a civil form to that which is essentially criminal." *Burgess* v. *Salmon*, 97 U. S. 381, 385. As we have shown, *supra*, pp. 51-57, deportation is not punishment; it is removal of undesirable aliens from the country.

This Court has twice unequivocally declared that the *ex post facto* rule does not apply to deportation proceedings. In *Bugajewitz* v. *Adams*, 228 U. S. 585, 591, the Court, speaking through Mr. Justice Holmes, stated:

> It is thoroughly established that Congress has power to order the deportation of aliens whose presence in the country it deems hurtful. The determination by facts that might constitute a crime under local law is not a conviction of crime, nor is the deportation a punishment; it is simply a refusal by the Government to harbor persons whom it does not want. The coincidence of the local penal law with the policy of Congress is an accident. *Fong Yue Ting* v. *United States*, 149 U. S. 698, 707, 728, 730. *Wong Wing* v. *United States*, 163 U. S. 228, 231. *Zakonaite* v. *Wolf*, 226 U. S. 272,

275. *Tiaco* v. *Forbes*, ante, p. 549. *The prohibition of ex post facto laws in Article I, § 9, has no application, Johannessen* v. *United States*, 225 U. S. 227, 242, and with regard to the petitioner it is not necessary to construe the statute as having any retrospective effect. [Italics supplied.]

Because of the last clause of the opinion, the remainder of the passage quoted is referred to by appellants as dictum, but it would seem clearly to constitute at least an alternative basis for the decision reached.

Mahler v. *Eby*, 264 U. S. 32, is a square holding to the effect that the *ex post facto* principle does not apply to deportation. In that case, the aliens had been convicted in 1918 of violations of the Selective Service Act of May 18, 1917 (c. 15, 40 Stat. 76). They were later ordered deported under authority of the subsequently enacted Act of May 10, 1920 (c. 174, 41 Stat. 593), which provided for the deportation of aliens who had been convicted under various statutes, including the Selective Service and Espionage Acts, if the Secretary of Labor, after hearing, should find the aliens to be undesirable residents. To the argument that this increased the punishment for the previously committed criminal act, thereby rendering the act of 1920 an *ex post facto* law, this Court replied (264 U. S. at 39):

> * * * It is well settled that deportation, while it may be burdensome and severe for the

> alien, is not a punishment. * * * *The inhibition against the passage of an ex post facto law by Congress in § 9 of Article I of the Constitution applies only to criminal laws. Calder* v. *Bull*, 3 Dall. 386; *Johannessen* v. *United States*, 225 U. S. 227, 242; *and not to a deportation act like this, Bugajewitz* v. *Adams*, 228 U. S. 585, 591. Congress by the Act of 1920 was not increasing the punishment for the crimes of which petitioners had been convicted, by requiring their deportation if found undesirable residents. It was, in the exercise of its unquestioned right, only seeking to rid the country of persons who had shown by their career that their continued presence here would not make for the safety or welfare of society. [Italics supplied.]

This decision is, we submit, a direct holding on the point, for had the Court there accepted the aliens' contention, they would have been entitled to discharge from custody. The case, however, was remanded with direction not to discharge the aliens until the Secretary should have time "to correct and perfect his finding" (p. 46), so that the *ex post facto* principle was plainly held inapplicable. Appellants contend that the statute there did not apply retrospectively because it required an administrative finding of present undesirability. But "It was their past conviction that put them in the class of persons liable to be deported as undesirable citizens" (p. 39), and the conviction alone was "enough to justify the Secretary in find-

ing that they were undesirable" (p. 42). Here Congress in the statute itself has made the finding that aliens who were once members of an organization advocating violent overthrow of the Government are presently undesirable residents. Nothing in the *Mahler* opinion or in the Constitution makes a direct legislative determination less decisive.

The statements in the *Bugajewitz* and *Mahler* cases as to the inapplicability of the *ex post facto* clause to deportation proceedings have never been repudiated or abandoned by this Court. Indeed they were both recently cited with approval in *Eichenlaub* v. *Shaughnessy*, 338 U. S. 521, 529: "There is no question as to the power of Congress to enact a statute to deport aliens because of past misconduct." Lower court decisions holding the *ex post facto* clause inapplicable to deportation are *United States ex rel. Feuer* v. *Day*, 42 F. 2d 127 (C. A. 2), and *United States ex rel. Lubbers* v. *Reimer*, 22 F. Supp. 573 (S. D. N. Y.)

Appellant in No. 206 challenges the historical validity of the construction of the *ex post facto* clause as inapplicable to civil matters (Br. pp. 19-24). Unquestionably, the generalization to that effect has been qualified, as the *Burgess* case indicates, so as not to apply to laws which impose punishment in civil form. But apart from this qualification, the body of authority in this Court and elsewhere that other retroactive civil legislation is not void as *ex post facto* is overwhelming (see pp. 104-105, *supra*)—despite powerful dissent in the

early years.[51] To the suggestion that the authority of *Calder* v. *Bull, supra,* decided in 1798, is impaired by the unavailability at that time of the records of the Constitutional Convention, it is sufficient to say that Justice Paterson was a leading member of the Convention and that subsequently, in 1854, the Court reaffirmed the *Calder* doctrine upon the basis of "the debates in the federal convention upon the constitution." *Carpenter* v. *Pennsylvania,* 17 How. 456, 463-464.[52]

The cases upon which petitioners rely—*Cummings* v. *Missouri,* 4 Wall. 277; *Ex parte Garland,* 4 Wall. 333, and *Pierce* v. *Carskadon,* 16 Wall. 234—are all cases involving punishment in civil form. In the *Cummings* and *Pierce* cases, this Court held invalid as *ex post facto* laws provisions of a state

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[51] See Justice Johnson dissenting in *Satterlee* v. *Mathewson,* 2 Pet. 414, 415-416 *e.*

[52] "The debates in the federal convention upon the constitution show that the terms '*ex post facto* laws' were understood, in a restricted sense, relating to criminal cases only, and that the description of Blackstone of such laws was referred to for their meaning. 3 Mad. Pap., 1399, 1450, 1579.

"This signification was adopted in this court shortly after its organization, in opinions carefully prepared, and has been repeatedly announced since that time. *Calder* v. *Bull,* 3 Dall., 386; *Fletcher* v. *Peck,* 6 Cranch, 87; 8 Pet., 88; 11 Id., 421.

"The same words are used in the constitutions of many of the states, and in the opinions of their courts, and by writers upon public law, and are uniformly understood in this restricted sense. 3 N. H., 375; 5 Mon. (Ky.), 133; 9 Mass., 363; 6 Binn. (Pa.), 271; 4 Ga., 208.

"The plaintiff's argument concedes that his case is not within the scope of this clause of the constitution, unless its limits are enlarged to embrace civil as well as criminal cases; and he insists that the court should depart from the adjudications heretofore made upon this subject. But this cannot be done." [17 How. 456, 463-464]

constitution and statute, respectively, requiring the taking of a test oath of past loyalty to the United States as a prerequisite to attaining certain rights—in the *Cummings* case to pursuing certain professions and avocations, and in the *Pierce* case to filing a motion for a rehearing in a judicial proceeding. The federal statute involved in the *Garland* case, which also was held invalid, required a similar oath as a prerequisite to admission of an attorney to practice before this Court. The legislation involved in those cases was passed immediately following the Civil War and the Court thought that its sole purpose was to punish those who had participated in the war on the side of the South. The Court concluded that the proscribed oath was not a test of fitness to practice the professions or avocations or to file a motion in court, and that the statutes were intended to, and did impose, either an added punishment for a past crime or a punishment for a past act innocent when done. The statutes were therefore held to be subject to the *ex post facto* clauses as laws imposing punishment.

Later decisions of this Court clearly establish that civil statutes based on past conduct are not invalid as *ex post facto* laws where they represent a bona fide exercise of regulatory power to accomplish a civil purpose. The Civil War cases have been confined to deliberate legislative attempts indirectly to inflict punishment where direct punishment is prohibited. In *Dent* v. *West Virginia*, 129

U. S. 114, this Court said with reference to the *Cummings* case that (129 U. S. at 126) "many of the acts from which the parties were obliged to purge themselves by the oath had no relation to their fitness for the pursuits and professions designated," and that "the court held that the oath was not required as a means of ascertaining whether the parties were qualified for those pursuits and professions, but was exacted because it was thought that the acts deserved punishment, and that for many of them there was no way of inflicting punishment except by depriving the parties of their offices and trusts."

In *Hawker* v. *New York*, 170 U. S. 189, this Court upheld as valid a state statute attacked as an *ex post facto* law, which prevented one who had been convicted of a felony from practicing medicine, where the conviction antedated the enactment of the statute. In that case the Court, distinguishing *Cummings* v. *Missouri*, and *Ex parte Garland*, *supra*, squarely held that past conduct may be made the test of fitness for a status which may be regulated by law where the statute is a bona fide exercise of regulatory power, and there is a rational connection between the status and the conduct. That opinion fully refutes appellants' contention that the statute here is invalid because of its retrospective effect:

> That the form in which this legislation is cast suggests the idea of the imposition of an additional punishment for past offences is not

conclusive. We must look at the substance and not the form, and the statute should be regarded as though it in terms declared that one who had violated the criminal laws of the State should be deemed of such bad character as to be unfit to practise medicine, and that the record of a trial and conviction should be conclusive evidence of such violation. [p. 196.]

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In *Foster* v. *Police Commissioners*, 102 California, 483, 492, the question was as to the validity of an ordinance revoking a license to sell liquor on the ground of misconduct prior to the issue of the license, and the ordinance was sustained. In commenting upon the terms of the ordinance the court said: "Though not an *ex post facto* law, it is retrospective in so far as it determines from the past conduct of the party his fitness for the proposed business. Felons are also excluded from obtaining such a license, not as an additional punishment, but because the conviction of a felony is evidence of the unfitness of such persons as a class; nor can we perceive why such evidence should be more conclusive of unfitness were the act done after the passage of the ordinance than if done before." In a certain sense such a rule is arbitrary, but it is within the power of a legislature to prescribe a rule of general application based upon a state of things which is ordinarily evidence of the ultimate fact sought to be established. [p. 197.]

The line between the Civil War oath cases and those establishing a reasonable regulation based upon past conduct was recently approved in *Garner* v. *Board of Public Works*, 341 U.S. 716. The *Cummings*, *Garland* and *Pierce* cases, *supra*, therefore, have force only where the test required by the act has no rational relation to the status regulated and the statute was enacted for the sole purpose of punishment. Cf. *American Communications Association* v. *Douds*, 339 U.S. 382, 413-414; *Cases* v. *United States*, 131 F. 2d 916 (C.A.I.), certiorari and rehearing denied *sub nom. Valazquez* v. *United States*, 319 U.S. 770, 324 U.S. 889. When the statute purports to be civil legislation, the question which determines its validity under *ex post facto* principles is whether its enactment was a bona fide exercise of regulatory power or an indirect attempt to inflict punishment. If the past conduct has a rational relation to fitness for the status, that fact has been taken to indicate that the statute was not enacted as punishment. Clearly the decision as to the connection between past conduct and present fitness should depend primarily upon the judgment of Congress. Congress should not be presumed to act *mala fide*. Consequently, the particular circumstances which prompted Congress to pass the law are significant, as well as whether the act is a direct or indirect method of accomplishing the legislative purpose. See *Pierce* v. *Carskadon*, *supra*; *Ex parte Garland*, *supra*; *Cummings* v.

Missouri, supra; cf. United States v. *Lovett*, 328 U.S. 303.

As we have shown, there is a rational connection between past membership in a subversive organization and present desirability as a resident. See Point II D, pp. 70-95, *supra*. There is no warrant for a conclusion that the act here, rather than being a bona fide attempt to expel undesirable aliens, was enacted indirectly to punish them. The legislative history of both the Act of 1940 and the Internal Security Act of 1950 establishes without doubt that Congress thought the residence in this country of aliens who had previously been members of a subversive group was undesirable and dangerous.

The comments of a few Representatives to the effect that the 1940 amendment would permit the deportation of Harry Bridges do not mean that the law was passed merely to reach a particular individual. The purposes of the Act, described at pp. 72-89 *supra*, show that Congress was thinking in terms of the general problem raised by *Kessler* v. *Strecker*, 307 U.S. 22. H. Rep. No. 994, 76th Cong., 1st Sess., p. 6; 84 Cong. Rec. 10358, 10367, 10449. In any event, Congress did not have Bridges, or any other single individual, in mind when the provision was reenacted in 1950.

The history of this provision extends over a period of 30 years. It is a direct method of accomplishing the Congressional objective of terminating the residence of such aliens, not an indirect

attempt to reach some other result. Certainly, four distinct Congresses, in 1918, 1920, 1940, 1950, could not have entertained improper motives. It cannot therefore be said that this law was enacted, as were the Civil War statutes and the one involved in the *Lovett* case, to punish ascertained individuals. Rather, it is a deliberate Congressional judgment that a particular class of aliens represents a danger to the welfare of the country and that their license to remain here should be revoked.

III

The Administrative Procedure Act Has No Application to These Deportation Proceedings Since They Were Initiated Prior to Its Effective Date

Petitioner Harisiades and appellant Coleman both contend that the warrants of deportation are invalid because the hearings were not held in accordance with Sections 5 and 11 of the Administrative Procedure Act, *infra*, pp. 140-141, specifying the qualifications of presiding inspectors and the manner of their selection. While appellant Mascitti does not raise the point, a decision on this issue would affect his case as well.

In all three cases, warrants of deportation were issued and served prior to September 11, 1946, the effective date of the Administrative Procedure Act. In all three cases hearings were held during the period in which, under the decision of this Court in *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, the Administrative Procedure Act was applicable

to deportation cases. In all three cases, any additional hearings would be subject to the provision incorporated on September 27, 1950, in the Supplemental Appropriation Act of 1951 to the effect that:

> Proceedings under law relating to the exclusion or expulsion of aliens shall hereafter be without regard to the provisions of sections 5, 7, and 8 of the Administrative Procedure Act. (Public Law 843, 81st Cong., 2d Sess., 8 U.S.C., Supp. IV, 155a.) [53]

In the *Harisiades* case, the warrant was issued in April 1930 and charged that Harisiades was a member of or affiliated with an organization advocating the overthrow of the government by force and violence (R. 120). The warrant was served on May 2, 1946 (R. 16-18, 126). At hearings held in October, 1946, supplemental charges were filed specifying that Harisiades had been after entry a member of or affiliated with a proscribed organization (R. 48). At reopened hearings, in February and March, 1948, Harisiades was further charged with having been, after entry, a member of and affiliated with an organization which distributes printed matter advocating the violent overthrow of the government (R. 210-211). The supplemental

[53] Section 11 of the Act depends for its application on hearings required to be conducted in accordance with Sections 7 and 8. Consequently, the reference to Sections 7 and 8 suffices to obviate the necessity of compliance with Section 11. The Supreme Court in the *Wong Yang Sung* case, although it talks principally about the requirements of Section 5, states that the challenge was directed against failure to comply with Sections 5 and 11.

charges were sustained but the original one was not (R. 807-855, 868-873).

The warrant for Coleman was issued on April 22, 1946, and served on May 10, 1946 (R. 22). It charged her with being, after entry a member of an organization advocating the violent overthrow of the government (Tr. Exhibit 2). A hearing was held on June 25, 1946 (Tr. 1) and was resumed on July 26, 1949 (Tr. 25). At the resumed hearing she was additionally charged with having been a member of an organization which advocated and which distributed printed matter advocating the violent overthrow of the government. The charge of membership was sustained but the Commissioner found that there was no evidence that the organization distributed subversive literature at the time Coleman belonged to the Party (R. 16).

The warrant for Mascitti's arrest was issued March 20, 1946, and served April 8, 1946. Hearings on the charge were begun in April, 1946, and resumed on November 7, 1949, at which time additional charges were lodged similar to those filed against Coleman. These charges were sustained (R. 17-21).

A. Section 12 of the Administrative Procedure Act provides that—

> * * * no procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement.

It is the Government's position that these proceedings, if not initiated by issuance of the warrants, were certainly initiated at the time the warrants were served. And since in all three cases this occurred before the effective date of the Administrative Procedure Act, that statute is inapplicable.

This construction is clearly in accord with Congressional intent. The Senate Print of the bill states in explanation of Section 12 that "the proposal is not to have retroactive effect as to proceedings 'initiated or completed prior to the effective date' of any requirement." (Sen. Doc. No. 248, 79th Cong., 2nd session, p. 43.) The Committee reports of both houses (S. Rep. No. 752, 79th Cong., 1st session, p. 30; H. Rep. 1980, 79th Cong., 2nd session, p. 47) stated:

> The word "initiated" in the final clause of the section means a proceeding formally begun as by the issuance of a complaint by the agency (irrespective of prior charges or investigations) or of notice of a rule-making hearing. As to new cases, the effective dates provided in section 12 are deferred longer so far as sections 7 and 8 are concerned in order to afford agencies ample time to prepare and make any adjustments required in their procedures.

It is thus evident that Congress intended to draw a simple sharp line between cases already "initiated" by some formal process, as to which the

Act was not to be applicable, and "new cases" thereafter commenced. Appellants, in Nos. 43 and 264, argue, on the basis of general statements in the legislative history, that the purpose of not making the Act immediately applicable to all cases was to allow the agencies time to revise their practices, *e.g.*, Sen. Doc. No. 248, 79th Cong., 2d Sess., p. 43. These statements were made with primary reference to the provisions of Section 12 setting definite time limits for the application of particular parts of the Act to new cases. As the Committee report quoted above shows, the Act was not to be applicable at all to cases already initiated. Certainly Congress did not mean that in such cases a reviewing court should subsequently have to determine whether there was or was not time for the procedure to have been altered.[54]

Clearly the formal process which initiates a deportation proceeding is the warrant which, like a complaint, starts the formal administrative hearing, brings the respondent before the administra-

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[54] Appellant in No. 43 relies on Rule 86(a) of the Federal Rules of Civil Procedure, which provides that the Rules "govern all proceedings in actions brought after they take effect *and also all further proceedings in actions then pending.*" The difference between Rule 86(a) and Section 12 of the Administrative Procedure Act is that the former, in terms, does apply to proceedings already initiated while the latter does not. The contrast shows that Congress knows how to draw the distinction which appellant seeks to ignore. The contrast between the two provisions also shows that Congress did not intend that each step in the administrative case be treated as a separate proceeding for purposes of determining the applicability of the Administrative Procedure Act.

tive tribunal, and sets forth the relief to be sought and the grounds therefor. The courts have always treated either the issuance or the service of the warrant as the commencement of the deportation process. Thus in *United States ex rel Trinler* v. *Carusi*, 166 F. 2d 457 (C.A. 3), vacated, 168 F. 2d 1014, the court, in deciding when the process was complete for purposes of judicial review, traced the whole administrative process and said (n. 5 at p. 459), "It is the issuance of the warrant which starts the administrative process * * *." In *Tillinghast* v. *Cresswell*, 54 F. 2d 459, 460 (C.A. 1), certiorari denied, 286 U.S. 560, in referring to that part of section 20 of the 1917 Act (8 U.S.C. 156), which provides for a different distribution of the cost of deportation where proceedings are "instituted" within five years after entry, the court said:

> * * * Surely deportation proceedings are instituted by the arrest of the alien, to be followed by a hearing, the recommendation of the Immigration Commissioner, and finally by the warrant of deportation.

The courts have even held that, where the statute requires deportation within a specified number of years after entry, the statutory requirement is met if proceedings are commenced by issuance or service of a warrant for the arrest of the alien within the specified period. *Raftery* v. *Tillinghast*, 63 F. 2d 97, 99 (C.A. 2); *Bun Chew* v. *Connell*, 233 Fed.

220 (C.A. 9); *Nocchi* v. *Johnson*, 6 F. 2d 1 (C.A. 1); *Metaxis* v. *Weedin*, 44 F. 2d 539 (C.A. 9). The Court of Appeals for the Second Circuit said in the *Raftery* case *supra*:

> The deportation proceedings were "instituted" * * * when the warrant of arrest was issued.

The proceedings here involved were therefore "initiated" prior to the effective date of the Administrative Procedure Act.

B. Harisiades contends, however, that since the charges set forth in the warrant served upon him were not sustained, and the order of deportation rests on charges filed after the effective date of the Administrative Procedure Act, the proceeding must be held subject to the Act. The fallacy in this position lies in the fact that not until after the hearing was held could it be determined that the original charge was not proved. The warrant set forth a valid basis for deportation at the time it was issued and at the time it was served.

Under the evidence as it developed at the hearing, the original charge could have been established if the warrant had been served when issued in 1930 because Harisiades was then a member of the Communist Party, even though he may not have been as of the time of hearings between 1946 and 1948. There is no showing, however, that the Government knew that Harisiades was not a member of the Party when the warrant was served in 1946. All

that happened was that, at the hearing, the evidence was not found sufficient to sustain the original charge. This does not tend to show that the proceeding was not validly commenced. A complaint starts a cause of action, whether or not the plaintiff succeeds and whether or not the complaint is amended before judgment. Similarly a warrant initiates a deportation proceeding whether or not the original charge is proved.[55] The addition of charges, while an expansion of the original proceeding, did not transform it into a new proceeding.[56]

An amendment of pleadings to add a cause of action or to conform to a change in the law does not institute a new cause of action. The Government's charge against Harisiades under the 1940 Act rests on the same facts as those which prompted the issuance of the original warrant, his membership in the Communist Party from 1925 to 1939. In analogous situations in civil actions, amendments of pleadings are permitted after the running

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[55] There is no significance in the fact that for a period from 1939 to 1940 Harisiades might not have been deportable because he was not then a member of a party which advocated the forcible overthrow of the Government, and the later provisions making him deportable for past membership had not been passed. If the service of the warrant had been effected in that period, the proceeding would have been commenced, whether or not the charge was proved. And it certainly is not clear that, if it had been essential to do so, the Government could not have proved affiliation during that period.

[56] The regulations of the Immigration and Naturalization Service specifically provide that additional charges be filed if the facts developed suggest it. 8 C.F.R. (1949 ed.) 150.6(l); 8 C.F.R. (1950 Cum. Supp.) 151.2(d).

of the statute of limitations, where the new claim arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading. Federal Rules of Civil Procedure, Rule 15(c); *New York Central Railroad* v. *Kinney*, 260 U.S. 340; *Harrison* v. *Love*, 81 F. 2d 115 (C.A. 6); *Wabash Railway Co.* v. *Bridal*, 94 F. 2d 117 (C.A. 8). The rule is applied even where there is a change in the statutory basis for the claim. *Missouri, Kansas & Texas Ry. Co.* v. *Wulf*, 226 U.S. 570 (amendment of suit by plaintiff in her individual capacity for person's death to suit by her as administratrix under the Federal Employer's Liability Act, at a time when the statute had run for an original action); *Batkiewicz* v. *Seas Shipping Co.*, 53 F. Supp. 802 (S.D. N.Y.) (amendment from claim only under the Jones Act to one under the Death on the High Seas Act as well). It is recognized in these cases that there is no essential unfairness in requiring response to a complaint where the basic facts have been alleged within the limitations period.

Certainly the standard for determining whether a proceeding has been commenced prior to the effective date of legislation should not be more stringent than the standard applied in determining whether an action has been commenced for the purpose of the statute of limitations.

What has been said with respect to Harisiades disposes of the similar contention by Coleman,

based on the fact that at the hearing additional charges were filed which repeated in substance the charge of past membership in the original warrant and added a charge based on membership in an organization distributing subversive printed matter.[57] In her case, the additional charge which was sustained was at most a formal rewording of the charge contained in the warrant, and was recognized as such by the Commissioner (see Statement, *supra*, pp. 10-11). The other additional charge of membership in an organization distributing subversive printed matter was merely an amplification of the original charge.[58] The initial charges called in question the activities of the organization and her past membership. The character of the literature it distributed was relevant evidence of its nature and was indeed heavily relied on by the Government. The addition of charges specifically directed at this phase of the organization's activities did not change the nature of the hearing and certainly did not initiate a new proceeding.

C. Harisiades further contends that even if the proceeding was initiated prior to the effective date of the Administrative Procedure Act the provisions governing the selection and conduct of presiding officers are not a "procedural" requirement under the last part of Section 12, which provides that "no procedural requirement shall be manda-

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[57] The same situation exists in the *Mascitti* case.

[58] In *Coleman's* case, this charge was not sustained (See Statement, *supra*, p. 11).

tory" as to previously initiated proceedings. We submit, however, that, read in context and in the light of its legislative history, it is clear that the exemption in Section 12 was intended to apply to all changes in administrative procedure effected by the Act, and that none of its provisions were thought to be applicable to a proceeding initiated before the effective date of the Act.

The part of Section 12 under consideration here is the last clause in a sentence which reads in full as follows:

> * * * This Act shall take effect three months after its approval except that sections 7 and 8 shall take effect six months after such approval, the requirement of the selection of examiners pursuant to section 11 shall not become effective until one year after such approval, and no procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement.

This sentence was thus intended to set forth the time when the whole act was to take effect and clearly indicates that no part of the act was to affect proceedings already instituted. The word procedural must be read in the light of the fact that the whole act deals with administrative procedure.

This construction is supported by the legislative history. An interim print of the Senate Committee on the Judiciary in June 1945 explained the effect of the final clause of Section 12 (which read.

the same as when finally enacted) as follows: "It should be noted, moreover, that * * * the proposal is not to have retroactive effect as to proceedings 'initiated * * * prior to the effective date' of any requirement." (Administrative Procedure Act, Legislative History 1944-1946, Sen. Doc. No. 248, 79th Cong., 2d sess. (1946) p. 43.) In the Senate Report (S. Rep. No. 752) on the bill, the clause reads as finally enacted in the text set out in Appendix A (*ibid.* p. 223); but in setting forth the statute for the purpose of explaining it, the report omits the word "procedural" and reads, "no requirement is mandatory as to any agency proceeding initiated prior to the effective date of such requirement" (*ibid.* p. 215). The same situation occurs in the House Report (H. Rep. No. 1980) (*ibid.* pp. 290, 281). The final report of the House Committee on the Judiciary contains a "diagram synopsis" of the Act which states that, "the Act is not to apply to proceedings previously begun." (*Ibid.* p. 266.) In explaining the bill on the floor of the House, Chairman Walter of the Judiciary Committee stated that, "no requirement of the bill is mandatory as to any agency proceeding initiated prior to the effective date of such requirement."[59] Senator McCarran, Chairman of the Senate Committee, in explaining the bill on the Senate floor, merely quoted the words of the final clause of section 12, but in doing so he omitted

[59] 92 Cong. Rec. 5655.

the word "procedural" entirely, thus indicating that he attached no significance to it.[60]

This lack of emphasis on the word "procedural" and the absence, in the many detailed explanations of each section, of any attempt to differentiate between the provisions which would be deemed procedural and those which would not, shows clearly that the term "procedural requirement" in Section 12 was not intended to render some portions of the Act applicable to proceedings initiated before its effective date. Rather it was intended to provide that none of the new procedures established by the Act should apply to proceedings initiated before the Act took effect.

IV

The Deportation Hearings Complied With Procedural Due Process

Harisiades and Coleman also contend that, even if the Administrative Procedure Act is not in terms applicable, the failure to observe its mandates deprived them of their constitutional right to procedural due process. This argument is based on the statement in *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 50-51, where, in holding the Administrative Procedure Act applicable to deportation hearings commenced after its effective date, this Court said:

> Indeed, to so construe the Immigration Act might again bring it into constitutional jeop-

[60] 92 Cong. Rec. 2159.

> ardy. When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality * * *. It might be difficult to justify as measuring up to constitutional standards of impartiality a hearing tribunal for deportation proceedings the like of which has been condemned by Congress as unfair even where less vital matters of property rights are at stake.

We submit that appellants read too much into this observation. Manifestly this Court did not mean to imply that the enactment of the Administrative Procedure Act *ipso facto* changed the standard of due process to the point where hearings already instituted in accordance with a procedure up to that point consistently upheld as according due process, suddenly became unfair. The Act itself, as we have shown, specified that it was not to be applicable to proceedings already commenced. And it is also clear that the Act was not laying down a standard of constitutional due process, for the Act by its terms does not have unlimited application.[61] The *Wong Yang Sung* decision basically rests on the assumption that Congress intended the Administrative Procedure Act to apply to deporta-

[61] Section 2 provides in pertinent part:

"* * * Except as to the requirements of section 3, there shall be excluded from the operation of this Act (1) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them, (2) courts martial and military commissions, (3) military or naval authority exercised in the field in time of war or in occupied territory, or (4) functions which by law expire on

tion hearings, and this interpretation of congressional intent was promptly repudiated by Congress itself when it provided in the Supplemental Appropriation Act of 1951 (p. 117, *supra*) that the Act should not apply to deportation hearings.

The only constitutional question is whether appellants were accorded a fair hearing. The standard laid down by this Court as to this issue is that procedural due process requires only due notice and ample opportunity to be heard before an immigration inspector, or no error so flagrant as to convince the court of the essential unfairness of the hearing. See, e.g., *Vajtauer* v. *Commissioner of Immigration*, 273 U.S. 103, 106; *Tisi* v. *Tod*, 264 U.S. 131. In these cases and many others, the identical procedure attacked by appellants was sustained without question.

Applying these principles, we think it is clear that the requirements of Section 11 of the Administrative Procedure Act placing examiners under Civil Service jurisdiction are not essential to due process. Nor do we deem the fact that an inspector may at some time have acted as an investigator and at another time as a presiding officer so inconsistent with essential fairness that it can be said to amount to a denial of due process. Except with the consent of the alien, the presiding inspector may not be the

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the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947, and the functions conferred by the following statutes: Selective Training and Service Act of 1940; Contract Settlement Act of 1944; Surplus Property Act of 1944."

one who investigates the case. 8 C.F.R. (1949 ed.) 150.6(b); 8 C.F.R. (1950 Cum. Supp.) 151.2(e). Certainly, the fact that a person has investigated similar types of cases does not make it difficult for him fairly to judge the case before him. Practicing lawyers are frequently appointed to act as special masters or arbitration officers without any question raised of their ability to act impartially. The duality of function for immigration inspectors has, as this Court recognized in the *Wong Yang Sung* case (at p. 45) been the uniform practice in the Immigration service for years. Congress has approved its continuation by its rider to the Supplemental Appropriation Act. We submit that, under such circumstances it cannot be deemed so grossly unfair as to infringe upon due process.

A more difficult problem might be presented if we had here the situation where one person at the same hearing both presented and judged the evidence. Such practice had been consistently upheld before the *Wong Yang Sung* decision,[62] although some courts expressed the view that it was "unfortunate".[63] We are not, however, confronted by that

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[62] *United States ex rel. Di Tomasso* v. *Martineau*, 97 F. 2d 503, 504 (C.A. 2); *United States ex rel. Ciccerelli* v. *Curran*, 12 F. 2d 394, 396 (C.A. 2); *In re Giacobbi*, 32 F. Supp. 508, 515 (N.D. N.Y.); *Ex parte Kwan So*, 211 Fed. 772 (N.D. Cal.); *United States ex rel. Boric* v. *Marshall*, 4 F. Supp. 965 (W.D. Pa.), appeal dismissed, 67 F. 2d 1020 (C.A. 3); certiorari dismissed, 290 U.S. 709.

[63] In *Palmer* v. *Ultimo*, 69 F. 2d 1, 2 (C.A. 7), the court, in rejecting the claim stated—

"In respect to the other contention that the inspector was investigator, prosecutor, and fact finder, it must be said that

situation in these cases. Except for the brief initial hearing, Coleman and Mascitti had separate examining and presiding inspectors at their hearings, and the findings were not made by any inspector who acted in an examining capacity. As to Harisiades, he specifically consented to Zimmerman acting "both as presiding and examining inspector" in the 1946-1947 hearings and requested that he act as presiding inspector in the reopened 1948 hearings, when a different presiding inspector, who would have had no examining functions and would have submitted the recommendation to the Commissioner, was about to be assigned to the case. (R. 200). In making this request he indicated that, despite Zimmerman's recommendation that he be deported, he had received a fair hearing when Zimmerman acted in both capacities, and that he thought that he would receive a fairer hearing from Zimmerman than from any other inspector.[64] If he had a constitutional right to in-

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such a practice is unfortunate and subject to criticism, yet it does not establish such unfairness as to vitiate the findings of such official."

The same court had earlier observed in *Reynolds* v. *United States ex rel. Dean*, 68 F. 2d 346, 348, that—

"* * * while do not think that the practice of having the inspector act as judge, investigator, prosecutor, and witness is by any means ideal, yet, in the absence of any showing from which it can be inferred in this case that the alien was prejudiced, we are of the opinion that the alien had a fair hearing * * * ."

[64] His attorney said (R. 200):

"* * * despite the adverse memorandum of Inspector Zimmerman who conducted the original hearing, such inspector was ready and willing to listen to the testimony and to give

spectors performing separate functions, clearly he knowingly and intelligently waived that right.[65]

These grounds aside, however, there is a far more fundamental reason why the appellants cannot successfully contend that they have been denied procedural due process. It is to be remembered that what ultimately is under attack in each case is the order of deportation. The objection is made that the character of the presiding inspector in the initial hearings under the warrants of arrest so deprived them of essential fairness as to vitiate the entire proceedings and make void the warrants finally issued. The objection ignores the fact that the deciding body is not the inspector who hears the case. He merely submits a memorandum setting

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the respondent an opportunity to meet such testimony; * * * the differences between the inspector and the respondent presented an issuable question which the Central Office and thereafter the Board of Immigration Appeals were called upon to determine upon the basis of a memorandum adverse to the respondent but nevertheless presenting and meeting his views.

"Respondent believes that the present change in the personnel is due to the fact that the original inspector [Zimmerman] in his case, *whom he consented to have act both as presiding and examining inspector*, was not sufficiently prejudiced against the respondent to meet the present prevailing views of the Department of Justice and for that reason has been removed from this case." [Italics supplied].

[65] This principle that constitutional rights may be waived has been applied in deportation cases. *Greco* v. *Haff*, 63 F. 2d 863 (C.A. 9); *Singh* v. *McGrath*, 104 F. 2d 122 (C.A. 9), certiorari granted *sub nom. Singh* v. *Haff*, 308 U.S. 538, certiorari dismissed, 308 U.S. 629; *Ex parte Kamiyana*, 44 F. 2d 503 (C.A. 9); *Kjar* v. *Doak*, 61 F. 2d 565 (C.A. 7); *United States ex rel. Doukas* v. *Wiley*, 160 F. 2d 92 (C.A. 7); *Schenck ex rel. Capodilupo* v. *Ward*, 80 F. 2d 422 (C.A. 1); *United States ex rel. Fortmueller* v. *Commissioner of Immigration*, 14 F. Supp. 484 (S.D. N.Y.).

forth all of the evidence adduced at the hearing, his proposed findings of fact and conclusions of law, and a proposed order, 8 C.F.R. (1949 ed.) § 150.7.[66] These documents are then transmitted to the Central Office of the Immigration and Naturalization Service for review by the Commissioner. 8 C.F.R. (1949 ed.) § 150.9; 8 C.F.R. (1950 Cum. Supp.) 151.7. The inspector is required to submit his memorandum to the alien, or his counsel, who may thereupon submit to the Central Office exceptions to the proposed findings, conclusions, or order, and brief in support thereof. It is only the Central Office, through the Commissioner, which enters an order of deportation. And this order is subject to further review by the Board of Immigration Appeals. 8 C.F.R. (1949 ed.) § 90.3; see 8 C.F.R. (1950 Cum. Supp.) 151.9. The Board is required to permit the alien or his counsel to make oral argument before reaching its decision. Only then does the decision of the Attorney General through his aides become final within the meaning of 8 U.S.C. 155. Compare *Bridges* v. *Wixon*, 326 U.S. 135, 151-

[66] Since the administrative determination of this case, the regulations have been amended to provide that the hearing officer shall prepare a decision which shall "set forth a summary of the evidence adduced and his findings of fact and conclusions of law as to deportability." It is provided that if exceptions are taken this decision shall be final only upon approval by the Commissioner. 8 C.F.R. (1950 Cum. Supp.) 151.5(a) and (e). Under current regulations, separate presiding and examining inspectors are provided for certain types of cases, including those relating to subversive activities and organizations. 8 C.F.R. (1950 Cum. Supp.) 151.2(f). These changes do not affect our argument.

152. Only then can a warrant of deportation issue directing that the alien be taken into custody. 8 C.F.R. (1949 ed.) § 150.12; 8 C.F.R. (1950 Cum. Supp.) 152.2.

The aliens here cannot sustain their position unless they can demonstrate that this whole process, as applied to them, lacks in due process. Whatever questions may arise in other situations stemming from the weight accorded the inspector's report on issues of fact and credibility, these appellants cannot claim unfairness in this process. The essential fact of the membership of each in the Communist Party is not disputed; it was in fact admitted by each appellant. On this determinative issue there was no issue of fact for the inspector to determine, even initially in each case. As to the character of the Communist Party as an organization advocating the violent overthrow of the Government, the inspector's findings are not challenged, and in any event that is clearly the type of issue on which the inspector's findings would not be final. Appellants were clearly accorded due process. Their real challenge is to the constitutional power of Congress to predicate deportation on their admitted membership in the Communist Party. The nature of the hearing does not affect that issue.

CONCLUSION

For the reasons set forth herein, it is respectfully submitted that the judgments of the courts below should be affirmed.

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APPENDIX

1. Act of October 16, 1918 (40 Stat. 1012), as amended by the Act of June 5, 1920 (41 Stat. 1008), and the Act of June 28, 1940 (54 Stat. 670, 673, 8 U. S. C. (1946 ed.) 137):

Sec. 1. That any alien who, at any time, shall be or shall have been a member of any one of the following classes shall be excluded from admission into the United States:

* * * * *

(c) Aliens who believe in, advise, advocate, or teach, or who are members of or affiliated with any organization, association, society, or group, that believes in, advises, advocates, or teaches: (1) the overthrow by force or violence of the Government of the United States or of all forms of law, * * *.

(d) Aliens who write * * * any written or printed matter * * * advising, advocating or teaching: (1) the overthrow by force or violence of the Government of the United States or of all forms of law, * * *.

(e) Aliens who are members of or affiliated with any organization, association, society, or group, that writes, circulates, distributes, prints, publishes, or displays, or causes to be written, circulated, distributed, printed, published, or displayed, * * * written or printed matter of the character described in subdivision (d). * * *

Sec. 2. Any alien who was at the time of entering the United States, or has been at any time thereafter, a member of any one of the classes of aliens enumerated in section 1 of

this Act, shall, upon the warrant of the Attorney General, be taken into custody and deported * * *.

2. Internal Security Act of 1950, Public Law 831, 81st Congress, 2d Session, enacted September 23, 1950, amended the Act of October 16, 1918, as amended, to read, in part, as follows:

[Section 22 (8 U. S. C., Supp. IV 137).] Any alien who is a member of any one of the following classes shall be excluded from admission to the United States:

* * *

(2) Aliens who, at any time, shall be or shall have been members of any of the following classes:

* * * *

(C) Aliens who are members of or affiliated with (i) the Communist Party of the United States, (ii) any other totalitarian party of the United States, (iii) the Communist Political Association, (iv) the Communist or other totalitarian party of any State of the United States, of any foreign state, or of any political or geographical subdivision of any foreign state; (v) any section, subsidiary, branch, affiliate, or subdivision of any such association or party; or (vi) the direct predecessors or successors of any such association or party, regardless of what name such group or organization may have used, may now bear, or may hereafter adopt;

* * *

(E) Aliens not within any of the other provisions of this paragraph (2), who are members of or affiliated with any organization which is registered or required to be registered under section 7 of the Subversive Activities Control Act of 1950, unless such aliens establish that they did not know or have reason to believe at the time they became members of or affiliated with such an organization (and did not thereafter and prior to the date upon which such organization was so registered or so required to be registered acquire such knowledge or belief) that such organization was a Communist organization.

(F) Aliens who advocate or teach or who are members of or affiliated with any organization that advocates or teaches (i) the overthrow by force or violence or other unconstitutional means of the Government of the United States or of all forms of law; * * *

(G) Aliens who write or publish, or cause to be written or published, or who knowingly circulate, distribute, print, or display, or knowingly cause to be circulated, distributed, printed, published, or displayed, or who knowingly have in their possession for the purpose of circulation, publication, or display, any written or printed matter, advocating or teaching opposition to all organized government, or advocating (i) the overthrow by force or violence or other unconstitutional

means of the Government of the United States or of all forms of law * * *

[Section 22, subsection 4(a).] Any alien who was at the time of entering the United States, or has been at any time thereafter, a member of any one of the classes of aliens enumerated in section 1 (1) or section 1 (3) of this Act or (except in the case of an alien who is legally in the United States temporarily as a nonimmigrant under section 3 (1) or section 3 (7) of the Immigration Act of 1924, as amended) a member of any one of the classes of aliens enumerated in section 1 (2) of this Act, shall, upon the warrant of the Attorney General, be taken into custody and deported in the manner provided in the Immigration Act of February 5, 1917. The provisions of this section shall be applicable to the classes of aliens mentioned in this Act, irrespective of the time of their entry into the United States.

[Section 23, amending Section 20 of the Immigration Act of February 5, 1917 (8 U. S. C., Supp. IV, 156(a).] The deportation of aliens provided for in this Act * * * shall be directed by the Attorney General to the country specified by the alien, if it is willing to accept him into its territory. * * * No alien shall be deported under any provisions of this Act to any country in which the Attorney General shall find that such alien would be subject to physical persecution. * * *

3. Public Law 14, 82nd Cong., 1st Sess., enacted March 28, 1951:

Sec. 1. The Attorney General is hereby au-

thorized and directed to provide by regulations that the terms "members of" and "affiliated with" where used in the Act of October 16, 1918, as amended, shall include only membership or affiliation which is or was voluntary, and shall not include membership or affiliation which is or was solely (a) when under sixteen years of age, (b) by operation of law, or (c) for purposes of obtaining employment, food rations, or other essentials of living, and where necessary for such purposes.

Sec. 2. The Attorney General is authorized in his discretion to record the entry of any alien to have been for permanent residence in any case where the alien heretofore, when applying for admission for permanent residence, was temporarily admitted pursuant to the ninth proviso of section 3 of the Immigration Act of February 5, 1917, as amended, and whose inadmissibility for permanent residence was determined to be solely by reason of membership or affiliation (other than membership or affiliation related to communism) under subsection 2 of Section 1 of the Act of October 16, 1918, as amended.

4. Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. 1001 *et seq.*

Section 5(c): * * * Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent en-

gaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. * * *

Section 11: Subject to the civil-service and other laws to the extent not inconsistent with this Act, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 7 and 8, who shall be assigned to cases in rotation so far as practicable and shall perform no duties inconsistent with their duties and responsibilities as examiners. Examiners shall be removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission (hereinafter called the Commission) after opportunity for hearing and upon the record thereof. Examiners shall receive compensation prescribed by the Commission independently of agency recommendations or ratings and in accordance with the Classification Act of 1923, as amended, * * *.

Section 12: * * * no procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement.

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